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Supreme Court of the United States

October Term 1978

No. 78-1376

DRESSER INDUSTRIES, INC.,
Petitioner,

v.

COMMUNITY TELEVISION SERVICES, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TABLE OF CONTENTS

	Page
PETITION FOR WRIT OF CERTIORARI	1
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional And Statutory Provisions Involved	2
Statement Of The Case	3
Reasons For Granting The Writ	13
I. The Theory Developed by The Court Of Appeals Was Not Argued At Trial Or On Appeal	13
II. The Decision Rendered By The Court Of Appeals Is Predicated On Legal Determinations Not Raised Or Argued By The Parties.	19
III. The Court Of Appeals Violated Basic Principles Of Appellate Review In This Case	24
IV. Petitioner Was Denied Its Right To A Jury Trial By The Disposition Of This Case In The Court Of Appeals	26
V. The Court Of Appeals Decision Leaves Commercial Transactions In A State Of Uncertainty	29
VI. This Court Should Exercise Its Responsibility To Supervise The Administration Of Justice In The Federal Courts	32
Conclusion	34
APPENDIX A	
Opinion Of The Court Of Appeals	A-1
APPENDIX B	
Denial Of Petition For Rehearing	A-16
APPENDIX C	
Memorandum Opinion Of District Court	A-19
APPENDIX D (Bound Separately)	
Statutes And Authorities	A-29
Excerpts From Trial Transcript	A-36

Briefs of Parties Below A-130
Plaintiff's Post Trial Brief A-130
Appellant's Brief A-172
Appellee's Brief A-220
Appellant's Reply Brief A-270
Exhibit 2 ..... A-292
Contract For Sale of Tower A-308

TABLE OF AUTHORITIES

Cases

Page

Alan Wood Steel Co. v. *Capital Equipment Enterprises, Inc.*, 39 Ill.App.3d 48, 349 N.E.2d 627 (1976) 28

Binkley Co. v. *Teledyne Mid-America Corp.*, 333 F.Supp. 1183, aff'd. 460 F.2d 276 (8th Cir. 1972) 24

Fountain v. *Filson*, 336 U.S. 681 (1949) 32

Geldermann and Co. v. *Lane Processing, Inc.*, 527 F.2d 571 (8th Cir. 1975) 30

Gillette Dairy, Inc. v. *Hydrotex Industries, Inc.*, 440 F.2d 969 (8th Cir. 1971) 28

Hormel v. *Helvering*, 312 U.S. 552 (1941) 24

Lutcher & Moore Lumber Co. v. *Knight*, 217 U.S. 257 (1910) 32,33

Matlack, Inc. v. *Rupp Corporation*, 57 F.R.D. 151,156 (E.D. Pa. 1972) 27

Pacific Marine Schwabacher, Inc. v. *Hydroswift Corp.*, 525 P.2d 615 (Utah 1974) 27

Putensen v. *Clay Adams, Inc.*, 91 Cal. Rptr. 319 (1st Dist. 1970) 28

S-C Industries v. *American Hydroponics System, Inc.*, 468 F.2d 852 (5th Cir. 1972) 22

Securities Exchange Comm'n. v. *Chenery Corp.*, 318 U.S. 80 (1943) 27

Page

Securities Investor Protection Corp. v. *Morgan, Kennedy & Co.*, 533 F.2d 1314 (2nd Cir.), cert. denied, 426 U.S. 936 (1976) 27

Sinka v. *Northern Commercial Co.*, 9 U.C.C. Rep. 1350 (Alas. 1971) 28

Smith v. *American Guild of Variety Artists*, 368 F.2d 511 (8th Cir. 1966), cert. denied, 387 U.S. 931 (1967) 25

Spokane County v. *Air Base Housing, Inc.* 304 F.2d 494 (9th Cir. 1962) 26

United States v. *White*, 454 F.2d 435 (7th Cir.), cert. denied, 406 U.S. 962 (1972) 25

Statutes

S.D. Compiled Laws § 57-4-34, U.C.C. § 2-316(1) 21

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner, Dresser Industries, Inc., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit or, alternatively, to vacate the judgment and remand to the Court of Appeals for further proceedings consistent with accepted judicial practice.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 586 F.2d 637 and is set forth as Appendix A. The order of the Court of Appeals denying a petition for rehearing and the dissent therefrom are set forth as Appendix B. The Memorandum Opinion of the District Court is set forth as Appendix C.

JURISDICTION

The Court of Appeals judgment of which review is sought was entered September 13, 1978. Petitioner's timely Petition For Rehearing was denied November 24, 1978. By order of this Court, Petitioner's time to file this Petition was extended to March 8, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals violated basic principles of appellate procedure when it searched the record for evidence to support a legal rationale which it had conceived, but which had never been urged by Respondent at trial or in the Appeal and to which Petitioner has never had an opportunity to respond.

2. Whether Petitioner was deprived of its constitutionally protected right to have a jury decide the claim against it when the Court of Appeals relied exclusively upon evidence which could not have been considered by the jury and was expressly rejected by the Trial Court.

CONSTITUTIONAL PROVISION, RULES OF PROCEDURE AND STATUTES INVOLVED

The United States Constitution, Amendment VII, provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

The Court of Appeals' decision raises questions involving federal appellate practice generally and, in particular, as embodied in Rule 28 of the Federal Rules of Appellate

Procedure reproduced in Appendix D. The power of this Court to supervise the Federal courts is embodied in Supreme Court Rule 19, which is also reproduced in Appendix D.

As presented in the District Court and in the Court of Appeals, this case involved various sections of the Uniform Commercial Code as enacted in South Dakota, including:

UCC	S.D.C.L.
1-102	57-1-5
1-204	57-1-14
2-313	57-4-27
2-316(1)-(4)	57-4-34 to -39
2-317	57-4-40
2-719(1)-(4)	57-8-49 to -51
2-725(1)-(4)	57-8-61 to -64

The foregoing sections are reproduced in Appendix D.[1]

STATEMENT OF THE CASE

At its inception, this case was no more than a dispute concerning principles of commercial law. But the events which transpired in its appeal reveal a serious miscarriage of justice which deserves, if not demands, the exercise of this Court's power of supervision. The result—left untouched—will unjustifiably and seriously impact the Petitioner in this case and in a related case yet to be tried[2] and could impose a significant

---

[1] Appendix D is bound separately and contains in addition to the text of the statutes, excerpts from the record which Petitioner deems to be of crucial importance.

[2] The Court's decision arguably may seriously impact two cases brought by Respondent's television stations. These suits are for the consequential damages allegedly suffered by the stations as a result of being off the air after the tower's collapse. The aggregate claim by the stations is for $1,856,000. The cases are captioned *Midcontinent Broadcasting Co.* v. *Dresser Industries, Inc.*, (File #77-4104) and *Forum Communications Co.* v. *Dresser Industries, Inc.* (File #77-4042). Both cases are pending in the United States District Court for South Dakota, Southern Division.

burden on the business community. More importantly, the decision could establish a precedential seed which could materially alter our traditional adversary system.

Instead of limiting itself to a review of the record and to the legal issues framed by the parties, the Court of Appeals became an advocate of both the facts and the law. Stated differently, this case presents a situation where the Court of Appeals decided that—despite the fact that the record was deficient—the verdict should be sustained even though that required a strained and convoluted rationale which had no support in the record and was not briefed or otherwise argued in the appeal by either party.

In short, the quality of justice dispensed by the Court of Appeals in this case is far less than what litigants are entitled to receive and substantially below that which this Court has tolerated in the past.

The Factual Background Of This Litigation

This controversy arose after a tall (2,000 feet) television transmission tower erected by Petitioner collapsed during a severe winter blizzard in South Dakota on January 11, 1975. The tower had been purchased by Respondent, Community Television Services, Inc. in 1968 and became operational in May of 1969. During the intervening five years prior to its collapse, Respondent was exclusively responsible for its operation and maintenance. The tower had been erected as a replacement for one (also purchased from Petitioner) that had been destroyed when a guy wire was severed by a low flying plane approximately nine months after it became operational.

Prior to its purchase of the first tower, Respondent thoroughly investigated and initiated negotiations with all manufacturers of tall towers before entering into a contract with

Petitioner in July of 1966. Respondent had purchased tall towers before from other manufacturers and was no stranger to the process involved in the purchase of such sophisticated equipment.

The contract for the second tower—which is the one at issue here—was signed in 1968 without renegotiation, except as to price, and in form substantially identical to the first contract. Both towers were erected pursuant to detailed technical specifications. For purposes of this case, the crucial specification was that:

> "The tower shall be designed to resist a uniform wind load per drawing T-5172, Sheet S-1, 60 psf on flats." (A-310)

It was common knowledge in the industry that this specification meant that the tower would be designed and constructed to withstand a horizontal wind force of 120 miles per hour, absent other factors such as ice.

After the tower's collapse, Respondent filed suit in the United States District Court for South Dakota, Southern Division on the basis of diversity of citizenship. Recovery was sought against Petitioner under four counts. In the tort counts, Respondent claimed Petitioner had been negligent in the design and construction of the tower, or that Petitioner should be held strictly liable for the tower's collapse. Under its contract counts, Respondent claimed that the tower's collapse breached express and implied warranties under the Uniform Commercial Code as enacted in South Dakota.

The Trial

Respondent based its case on liability primarily on the testimony of expert witnesses. That evidence—considered most favorably to Respondent—established that the wind velocity at the height of the storm was less than 120 miles per hour and that the tower did not collapse because of a build up of

ice—which was one of Petitioner's key defenses. However, none of Respondent's experts testified nor was there *any* other evidence that the tower failed to conform to any of the contract specifications or that it was carelessly or negligently erected. In fact, all of Respondent's technical experts "unequivocally" agreed that the tower did meet the wind loading specification of "60 psf on the flats." Finally, there was no evidence of any sort that the tower collapsed because of the *force* of the wind.

As observed by the Eighth Circuit:

> "Community's experts testified that they had eliminated metallurgical or mechanical failure or abnormal wind loading as the cause of collapse. (A-3)
>
> . . .
>
> Thus, the jury did not find that Dresser's product or construction was defective in materials or workmanship or failed to meet the applicable specifications. (A-12)

The only causational evidence offered by Respondent to explain the collapse was expert opinion that the tower's failure occurred because of a phenomenon (inherent in all guyed structures) known as harmonic resonance. These experts conceded that engineering avoidance of harmonic resonance was beyond the state of the art for tall towers.[3] In severe cases, harmonic resonance can—and in this case according to Respondent's experts did—so fatigue the structure that it is literally shaken down.

In defense, Petitioner's experts sought to establish that the tower had collapsed because of a build up of ice on the tower members, which magnified the effect of the wind far beyond the 120 mile per hour wind loading specification.

Petitioner moved for a directed verdict on all counts. The District Court dismissed the implied warranty count by enforcing the disclaimer contained in the parties' contract. That provision (herein referred to as "Item 9") also contains time and damage limitations on Petitioner's warranties, which were the subject of considerable dispute at trial and in the Appeal. Item 9 states in pertinent part as follows:

[3] A finding acknowledged by the Court of Appeals. (A-4)

> "9. WARRANTY AND LIMITATION OF LIABILITY: Seller warrants, for a period of six months, that products of its own manufacture and any construction performed hereunder by the Seller shall meet the applicable specifications incorporated in this contract, and be free from defects in material and workmanship. Provided Buyer submits a claim in writing to Seller immediately upon its discovery and in any event within six (6) months after shipment if no construction is performed hereunder or within six (6) months after final acceptance by Buyer if construction work is performed (or within six months from notification of completion by Seller if Buyer wrongfully refuses or delays final acceptance), Seller shall, at Seller's sole option, repair, replace or refund an equitable portion of the purchase price of any product or work which Seller determines to have been defective or failed to meet applicable specifications. . . .
>
> Except for obligations expressly and specifically assumed under the other clauses of these Sales Terms, the foregoing is Seller's only warranty, obligation, and liability, under tort (including alleged negligence) contract or otherwise for or in connection with its products, work and services or use thereof. THE FOREGOING IS EXPRESSLY IN LIEU OF ALL OTHER WARRANTIES WHATSOEVER, EXPRESS, IMPLIED AND STATUTORY, INCLUDING WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS. IT IS SPECIFICALLY UNDERSTOOD SELLER'S PRICE IS BASED UPON THE FOREGOING LIMITATION OF LIABILITY AND BUYER'S WAIVER OF ANY AND ALL CLAIMS FOR DAMAGES." (Emphasis as in original. The full text of the "Terms and Conditions of Sale" appears at A-318 and the other contract provisions at A-308.)

Despite some serious misgivings about whether Respondent had any proof to establish a breach of its express warranty claim, (A-55, 61), the District Court denied Petitioner's motion except as to the implied warranty count.

The case was given to the jury under standardized instructions regarding negligence, strict liability and breach of express warranty. (A-108) The only express warranty mentioned in the instructions was the 60 psf design specification, which the District Court found to be a warranty as a matter of law. (A-120) Consistent with this, the District Court described Respondent's claim to the jury as follows:

> "In its third cause of action, and as an alternative plaintiff alleges that defendant is liable for damages on the ground that the defendant expressly warranted to plaintiff, in the sale of the tower, that the tower would withstand wind pressure of 60 pounds per square foot on its flat surfaces, when in fact the tower collapsed under less wind pressure than that for which it was warranted." (A-111)

The jury returned a verdict pursuant to special interrogatories under which it found that Petitioner was not negligent and not strictly liable. Its verdict against the Petitioner was premised *solely* on the claim that the tower's collapse constituted a breach of the express warranty.

The Appeal

On appeal, Petitioner advanced two grounds for reversal. The first was that Item 9 of the parties' contract had been erroneously interpreted by the District Court. Four issues pertaining to the claimed time and damage limitations on the specification warranty were raised by Petitioner and argued at length. The second ground was that there was no evidence to support the verdict based on a breach of the design specification warranty, because Respondent had introduced no evidence that the force of the wind had caused the collapse. Throughout

both its briefs, Petitioner repeatedly asserted that the only warranty involved in the proceedings was the design warranty. (A- 185, 214, 272)

The Respondent never challenged Petitioner's assertion that only the design specification was at issue and its brief simply mirrors the legal issues raised by Petitioner. Respondent sought to sustain factually the jury verdict in a very simplistic manner. (A-267) It argued that since the specification guaranteed that the tower would be designed to resist a wind velocity of 120 miles per hour and since the wind velocity was less than that when the tower collapsed, that circumstance was sufficient causational proof to establish a breach of "the express [design] warranty."[4] It made this argument despite the fact that its own experts had testified that the tower's collapse resulted, not from the force of the wind, but rather from harmonic resonance—the avoidance of which had been established to be beyond the state of the art for tall towers.

The Opinion Of The Court of Appeals

The Opinion acknowledges that Respondent's experts *"unequivocally"* agreed that the tower met the design specifications. Indeed, the Opinion says that Petitioner had *convinced* the Court of Appeals that Respondent had not proved a breach of that express warranty. (A-6)

But the Court of Appeals goes on to sustain the verdict—not on the basis of any argument advanced by the

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[4] Respondent persisted throughout the trial and the appeal in relying on the totally inapplicable theory of *res ipsa loquitur,* despite the fact that the District Court had quite properly instructed the jury that:

> "The defendant was not an insurer of the safety of the tower nor does the mere occurrence of a collapse create any inference of a breach of any warranty." (A-116)

If Respondent was relying on the warranty perceived by the Court of Appeals, it would not have been necessary to resort to such a tenuous argument in support of the jury verdict.

parties—but rather on a theory it apparently concocted on its own. The essence of the Court's rationale sustaining the verdict against Petitioner was that two of its advertising brochures—reviewed by Respondent prior to its purchase of the *first* tower in 1966—contained "affirmations" which the Court said created a warranty regarding the tower's durability and performance. This new warranty the Court said was not limited in any way by Item 9 of the contract and was of *presumably* unlimited scope and duration. The so-called "affirmation" seized upon by the Eighth Circuit from the advertising brochures was:

> "Wind force creates the most critical loads to which a tower is normally subjected. When ice forms on tower members thereby increasing the surface area resisting the passage of wind, the load is increased.
>
> Properly designed towers will safely withstand the maximum wind velocities and ice loads to which they are likely to be subjected. Dresser-Ideco can make wind and ice load recommendations to you for your area based on U.S. Weather Bureau data."[5] (A-6)

The advertising brochures, although introduced in evidence (Exhibits 1 and 2), were received for a limited purpose and had never been urged by Respondent in the appeal or otherwise as the source of a separate and broader warranty. On the contrary, they were relied upon by Respondent exclusively to establish the origin of the design specification and to establish that "60 psf on the flats" equated to a wind velocity of 120 miles per hour. (A-241, 243) Nevertheless, the Court of Appeals construes the brochure language to mean that Petitioner had warranted that its towers would forever *"withstand the maximum wind velocity and ice load to which it would likely be subjected."* (A-7)

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[5] Exhibit 2, which is the brochure containing the quoted language, is reproduced in Appendix D at page A-292. Exhibit 1 is a fold out pamphlet and not readily reproducible.

Having created this new warranty, the Court of Appeals was faced with the dilemma of finding evidence of a breach. Respondent's experts had unequivocally stated that *neither* the wind nor ice nor a combination thereof were factors in the collapse of the tower, but that harmonic resonance was the most likely cause. Not to be discouraged in its effort to find a breach of its weather related warranty, the Court of Appeals adopts Petitioner's evidence that ice loading had caused the tower to collapse and speculates that the wind and ice loading testified to *by Petitioner's experts* could have been found by the jury to be the cause of the collapse and resultant breach of the warranty fashioned by the Court of Appeals.

The tortured analysis offered by the Court of Appeals is pathetically anomolous—at least from Petitioner's point of view. Respondent went to great pains during the trial to prove that no ice existed and the District Court's Memorandum Opinion states that:

> "The jury apparently found that the presence of ice and snow on the tower at the time of collapse, if any, had been insufficient in amount to be a causal factor in the collapse." (A-20)

Respondent's perception of what the jury did with the ice and snow theory advanced by Petitioner is that it was "rejected" by the jury. (A-241)

Having gone outside the written contract between the parties to find a warranty and having developed its own theory of breach, the Court of Appeals then had to overcome the hurdles posed by Item 9. The Eighth Circuit simply begs these questions by saying it is unnecessary to consider whether the duration of Petitioner's warranty and the remedy available in the event of a breach were limited by Item 9, since the new warranty was "outside" the contract. (A-12)

The Court of Appeals could not escape Item 9 entirely, since it purports to disclaim *all* warranties not in the contract and would presumably nullify this new extra-contractual war-

ranty. Despite not a word in the briefs and no ruling below on this issue, the Court of Appeals proclaims that its 'extra-contractual warranty is immune from Item 9 because to enforce the disclaimer contained therein would ostensibly create an inconsistency forbidden by the U.C.C. (A-14)

The Petition For
Rehearing En Banc

Petitioner duly filed a petition for rehearing urging the serious errors committed by the Court. Perhaps the most dramatic evidence that the panel Opinion is utterly confounding is expressed in the dissent to the denial of the petition for rehearing.

The author of the dissent is the Chief Judge of the Court and had originally joined in the panel Opinion sustaining the District Court. In his dissent, Chief Judge Gibson severely criticized the panel Opinion for its unpardonable trespass on the parties' agreement based on convoluted reasoning. The dissent concludes with this observation:

> "To suppose that the limitation on remedy contained in the contract was intended to apply only to the warranties contained in the written agreement but not to those in the catalog, is to build a fantasy on top of a fiction. Under U.C.C. § 2-719(1), S.D. Compiled Laws, § 57-8-49, the parties are entitled to limit remedies. To further certainty in commercial relationships and justice between these parties, we ought to enforce the contract as written." (A-17)

THE WRIT SHOULD BE GRANTED FOR THE FOLLOWING REASONS

I. The Theory Developed By The Court of Appeals Was Not Argued At Trial or On Appeal

When the Court of Appeals determined, *sua sponte,* that the verdict was sustainable on the basis of an express warranty contained in advertising brochures, it effectively deprived Petitioner of its day in court both at trial and in the Appeal. The theory adopted and advanced by the Court of Appeals was never considered by the parties or by the District Court as a basis for Petitioner's liability. *That fact is obvious from the record.*

The Evidentiary Status
Of The Advertising Brochures

The advertising brochures cannot and should not have been given the probative weight attached to them by the Court of Appeals. Respondent never urged to the jury that the brochures were introduced for the purpose of establishing a broad express warranty. Moreover, the trial judge expressly negated—in the presence of the jury—the evidentiary import which the Court of Appeals attached to those exhibits.

Respondent's first witness identified Exhibits 1 and 2 and none of Respondent's witnesses ever testified about them again. He characterized the material as sales *"propaganda sheets,"* which were received prior to the *first* tower contract in 1966. The insignificance of these brochures to the transaction is borne out by a review of the meager and superficial testimony concerning them. (A-36 to 43) Most significantly, when the exhibits were offered in evidence the following colloquy took place in the presence of the jury:

Mr. Doyle: If the Court please, we have no objection to the admissibility of Exhibit number 2, as it's our understanding that this material is *only preliminary,* and that in accordance with our discussion with the Court, at least at this point, we do not object to the exhibit, as such, *if it's only preliminary.*

The Court: Well, I don't know whether Mr. Evans is going to concede that it's only preliminary.

Mr. Evans: Well, I think it's part of the plaintiff's case, Your Honor, as I put the pieces together.

The Court: Well, I guess I better take a look at it if I'm going to have to rule on it. *I might just add that I don't regard Exhibits 1 or 2, either one of them, as being part of the contract, and if there's a later contract that's to be introduced, that would supersede* [20] *the brochures,* but Exhibit 2 will be—the objection to Exhibit 2 is overruled and it may be received in evidence. (Emphasis supplied). (A-42)

Since Respondent did introduce the contract, which under the District Court's ruling superseded the brochures, they could not have been relied upon by the jury to "amplify" or expand that written agreement between the parties. Respondent's counsel was silent after the District Court's ruling and throughout the remainder of the trial never once—before the jury or otherwise—suggested that Petitioner had guaranteed in its brochures that the durability and performance of the tower would *exceed* the specification design criteria.

Respondent's Case Was Predicated Exclusively On the Specification Warranty

At no time did Respondent suggest, either explicitly or by implication, that the brochures' function was the creation of a separate and expanded warranty. Yet it had numerous opportunities to do so.

In his argument in support of a directed verdict counsel for Petitioner asserted that:

> "(t)he testimony was clear that the only express warranty that is claimed is sixty pounds per square feet on the flats . . . " (A-51)

To this assertion, Respondent remained silent. Furthermore, on two occasions during the course of the same argument, the District Court commented on Respondent's failure to offer any evidence that Petitioner had breached the 60 psf design specification warranty. (A-55, 61) Yet Respondent did not attempt to remedy that potentially fatal evidentiary defect with any suggestion that some other express warranty might be available.

The most liberal construction of the evidence usually appears in a party's closing argument to the jury. (See A-76) But counsel for Respondent never once suggested to the jury that the brochures contained an express warranty, other than the specification warranty allegedly breached by Petitioner. Moreover, Respondent's counsel never urged that these brochures somehow "amplified" the contract specification beyond its intended and clear meaning as presumed by the Court of Appeals.[6] While the advertising exhibts were alluded to in closing argument, counsel's statements (A-77, 101) never suggested they were the source of a contractual guarantee beyond the specification warranty. Moreover, it offered not a single

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[6] It is clear from Respondent's brief that the "amplification" it was referring to was that the brochures contained a wind table to equate the specification to a wind velocity. As stated by Respondent in its brief to the Court of Appeals:

> "The District Court held as a matter of law that the 60 psf specification, as amplified in the brochure of Dresser, created an express warranty that the tower would withstand a wind velocity of approximately 120 miles per hour. This warranty was subsequently breached when the tower collapsed under the force of an 80 mile per hour wind." (A-244)

instruction which would have permitted the jury to consider the brochures as the source of a separate warranty.

Even more telling, Respondent allowed the following instruction to the jury:

> "If you find that the pertinent tower specifications were set by the plaintiff or by its direction, and if you find that the tower supplied by the defendant conformed to those specifications, then there can be no breach of an express warranty on the part of the defendant." (A-121)

If Respondent had intended to rely on some extra-contractual warranty it could not have allowed this instruction, since it is fatal to the very theory which the Court of Appeals evolved and Respondent now urges.

Perhaps the most compelling evidence that Respondent never "tried" to the jury the question of whether the brochures contained a warranty is found in Respondent's comprehensive brief in opposition to Petitioner's motion for judgment notwithstanding the verdict. (A-130) In the very first sentence of its brief, Respondent characterizes the jury verdict as follows:

> "By its verdict, the jury found that the Defendant had breached *the express warranty contained in the typewritten specifications of the contract to-wit* . . . " [60 psf on the flats]

Respondent then goes on to list eleven separate grounds why the verdict should be sustained, not one of which even hints at a warranty contained in the advertising brochures. For that matter, Exhibits 1 and 2 are not even referred to or cited in the entire brief. Respondent concludes its lengthy legal argument with this parting statement:

> "The Defendant made an explicit and specific warranty when it stated:

> 'The tower shall be designed to resist a uniform wind load per drawing T-5172, Sheet S-1, 60 psf on flats.'
>
> When the tower failed there was a breach of this express, specific warranty." (A-170)

Finally, it is clear from the Memorandum Opinion that, at least in the District Court's view, the only warranty Petitioner had made and the only warranty the jury could have found breached was contained in the contract specifications.[7]

In The Appeal, A "New"
Warranty Was Never Urged
By The Respondent

If the Court of Appeals' perception of the record is legitimate, one would expect to find—either in Petitioner's or Respondent's brief—some hint that the brochures compel such a dispositive result. Yet one can search with meticulous care and find not even a suggestion that they create an express warranty outside of and going beyond the contract or that such a warranty was ever breached. On the contrary, beginning with the "Statement of Issues" the briefs of both parties are devoted exclusively to the legal and factual disputes surrounding the specification design warranty. (See A-172, A-220, A-270)

Respondent's brief never once challenges the repeated assertion by Petitioner that the *only* warranty at issue is the

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[7] "The specifications incorporated in the contract for sale disclosed that 'The tower shall be designed to resist a uniform wind load per drawing T-5172, Sheet S-1, 60 psf on flats.' . . . Defendant's advertising brochures stated that the wind velocity necessary to create this amount of pressure would be approximately 120 miles per hour, absent any other factors. This court found as a matter of law that this specification created an express warranty. . . .

The jury's answers to the special interrogatories submitted to them by the Court show that they based Defendant's liability on a breach of *the* express warranty." (A-21)

design specification. There are, indeed, some passing references by Respondent to the brochures, but never in the context of a separate and broader warranty. In fact, all such references relate to establishing that the 60 psf warranty was first explained by Petitioner in its advertising and later codified in the written contract. (A-229, 241, 245, 249, 255)

Moreover, why is there no discussion in any of the briefs about what turned out to be the crucial legal decision by the Court of Appeals—namely whether Item 9 operated to disclaim the new extra-contractual warranty? The reason is painfully obvious! That question had never been considered by the District Court because there was no occasion for the parties to address that issue at trial.

While it is obviously very tempting for Respondent to denounce righteously the charge that it was the Court of Appeals—not it—which molded a theory to sustain the verdict, the opening paragraph of Respondent's "Argument" to the Court of Appeals suggests otherwise:

> "During the negotiation process for the tower contract, in its brochure and in the final order form, Dresser explicitly guaranteed that the subject tower was designed to safely withstand a horizontal wind pressure of 60 psf on flat surfaces. This is equivalent to an actual wind velocity of approximately 120 miles per hour. The District Court properly held as a matter of law that this design guarantee created an express warranty. The tower design proved inadequate." (A-241)

Respondent Expressly Rejected The Theory Adopted By the Court of Appeals

The Court of Appeals overlooked an admission in Respondent's brief which is directly contrary to the dispositive

conclusion it made. In discussing Petitioner's defense that ice and snow in combination with the wind had caused the collapse, Respondent made this fatal concession:

> "Dresser's theory, if correct, provided a complete defense to the breach of warranty cause of action." (A-236)

Yet the Court of Appeals speculates that the evidence of ice and snow plus the wind could have been found by the jury as the cause of the collapse and the basis for its verdict that Petitioner had breached the newly created advertising warranty. There is no conceivable way to square Respondent's statement with the rationale seized upon by the Court of Appeals. It reveals, perhaps more than anything else, that the idea to elevate the brochures to their dominant position in this case was conceived solely by the Court of Appeals.[8]

II. The Decision Rendered By The Court Of Appeals Is Predicated On Legal Determinations Not Raised Or Argued By The Parties

Having found what it perceived to be evidentiary support for the verdict, the Court of Appeals was then required to resolve a number of legal issues—none of which had been briefed or argued by the parties.

The Application Of The Parol Evidence Rule. The Opinion of the Court of Appeals literally begs for a discussion of the parol evidence rule in connection with the brochures. Given the fact that the District Court said that the written contract "*would*

[8] This admission renders incredible the indignant assertions by Respondent that the references to the brochures in its brief show that it urged in the appeal the theory seized upon by the Court of Appeals.

supercede the brochures," some explanation was necessary to explain how this rule can be legitimately avoided. Petitioner never raised this issue on appeal because Respondent had never relied on the brochures as the source of a warranty. Respondent's assertion in the response to the Petition for Rehearing that Petitioner had "waived" this issue is simply specious. The very fact that no parol evidence argument was made by *either* party at trial or in the appeal is convincing proof that no one ever perceived that the brochures could be elevated to the evidentiary stature suggested, in the first instance, by the Court of Appeals.

The creation of a warranty through the advertising brochures was both factually and legally impossible. Those brochures, submitted three years before and in connection with a separate transaction, are by definition extrinsic to the contract in this case. As such, they may be given legal significance *only* if that contract was either vague or ambiguous, or failed to be a final and intergrated expression of the parties' intent. But at no time was the contract argued or found to be so deficient.[9]

Warranty Disclaimer Provision. Having elevated the brochures to contractual stature, the Court of Appeals was faced with a serious dilemma. Item 9 of the contract said, in what the District Court found to be clear and conspicuous language, that:

> "THE FOREGOING IS EXPRESSLY IN LIEU OF ALL OTHER WARRANTIES WHATSOEVER, EXPRESS, IMPLIED AND STATUTORY, INCLUDING WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF

[9] In this connection, the Court of Appeals conveniently ignored the very first paragraph of the "Terms and Conditions of Sale." "1. General: All sales by DRESSER ... (hereinafter called Seller) are made subject only to these terms and conditions and no others unless expressly modified in writing and signed by an authorized representative of the Seller at its home office. Verbal arrangements and the terms and conditions of any purchase orders submitted by the Buyer shall be of no force and effect." (A-318)

> MERCHANTABILITY AND FITNESS. IT IS SPECIFICALLY UNDERSTOOD SELLER'S PRICE IS BASED UPON THE FOREGOING LIMITATION OF LIABILITY AND BUYER'S WAIVER OF ANY AND ALL CLAIMS FOR DAMAGES."

The issue of whether this contractual provision effectively disclaimed the new advertising warranty had never been raised, argued, briefed or even discussed by anyone at any stage of the entire proceeding. Despite this, the Court of Appeals simply declares that the warranty disclaimer is inoperative because it cannot be construed consistently with the new warranty which it found outside the contract. Of course not! That was precisely its purpose—to exclude all warranties except those expressly agreed upon by the parties in their contract.

The Court of Appeals justifies its bizarre and extremely prejudicial holding on Section 57-3-34 of the South Dakota Uniform Commercial Code. (A-13) However, with a rather surprising display of judicial myopia, the Court of Appeals overlooks the fact that this provision is expressly subject to the parol evidence rule.[10] We are left to wonder just what sort of legal manipulation can justify obliteration of such a contractual provision. Twice Respondent executed that contract. Twice its representatives signed directly below Item 9. And twice it paid a price which it knew was predicated on the very disclaimer which it now repudiates.

It is shockingly apparent that in order to justify a preconceived theory the Court of Appeals was merely bootstrapping. First, the Court ignores the parol evidence implications inherent in establishing a new warranty through the brochures in the first instance. Then it compounds that error by not even addressing itself to the express parol evidence caveat in the very

[10] S.D. Compiled Laws Ann. § 57-4-34, U.C.C. § 2-316(1), provides: *Construction of words or conduct tending to negate or limit express warranty inoperative.* Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; *but subject to the provisions of chapter 57-3 on parol or extrinsic evidence (§ 57-3-4)* negation or limitation is inoperative to the extent that such construction is unreasonable. (Emphasis supplied)

statute it relies on to immunize the newly discovered warranty from certain extinction.[11]

Ironically, if the Respondent had actually attempted to assert and prove at trial that the brochures were the source of an express warranty, it is likely that the District Court would have ruled that they could not be as a matter of law. The District Court had enforced the warranty disclaimer to negate all implied warranties, which are nothing more than extra-contractual guarantees which the law presumes exist unless disclaimed. Furthermore, the trial court did, in fact, apply the parol evidence rule when it said the brochures would be "superseded" by the contract.[12]

Limitation of Remedy. At trial and in its briefs to the Court of Appeals, the Petitioner vigorously sought to enforce a provision that was at the very heart of the parties bargain—a limit on its financial exposure. Given the expensive nature of the structures it sold and recognizing that prices were escalating in the industry, Petitioner prudently placed a limit on the amount for which it would be liable to its purchasers in the event of a defect—the maximum amount being a refund of the entire purchase price.

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[11] The case offered by the Court of Appeals to support its holding demonstrates how superficially this issue was considered by the Court. In *S-C Industries* v. *American Hydroponics System, Inc.*, 468 F.2d 852 (5th Cir. 1972), the issue was whether a technical specification contained in the written plans for the structure was a warranty and, if so, whether it was negated by exclusionary language in the purchase order. Obviously, this was a clear case of an inconsistency within contemporaneous contract documents as opposed to an inconsistency between the contract disclaimer and extrinsic and prior language which the Court of Appeals was faced with here. Stated differently, the Court in the *S-C Industries* case had no occasion to consider the parol evidence rule.

[12] Carried to its logical extreme, what the Court of Appeals is suggesting by its holding is that no warranty disclaimer can ever be effective because by its very nature it would be inconsistent with all extra-contractual warranties.

The Court of Appeals ignores the legal discussion offered by the parties and avoids a decision about whether Petitioner's contractual damage limitation is valid. The Court takes the easy way out by concluding that the limitation applies *only* to damages arising out of breaches of contractual warranties—but of course (says the Court) the express warranty here involved is *outside* the contract.

The Chief Judge of the Court of Appeals was so outraged by this convoluted and specious reasoning (which he said "presents a serious question of injustice") that he authored a dissent to the denial of the petition for a rehearing. In taking the court to task for its actions the Chief Judge said:

> "To suppose that the limitation on remedy contained in the contract was intended to apply only to the warranties contained in the written agreement but not to those in the catalog, is to build a fantasy on top of a fiction." (A-17)

Finally, it should be observed that the opinion of the Court of Appeals is internally inconsistent. When the Court said it did not have to consider that issue because the new warranty was outside the contract, it was ignoring the language in its own opinion which said that the "affirmation" appearing in the brochures only "amplified" and gave full meaning to the contractual specification. (A-6) If the advertising warranty was actually only an amplification, rather than a separate warranty, then it would be subject to the same limitations as the specification. If that is the basis of the Court's decision, we respectfully suggest that the Court of Appeals could not properly avoid considering whether Petitioner's damage limitation provision is operative.

Petitioner would most assuredly wish to have been heard on the foregoing legal issues decided by the Court of Appeals. Not only was Petitioner prejudiced in the resolution of this dispute, but in other disputes that may arise in the future regarding its towers. The opinion arguably establishes a

warranty on all of Petitioner's towers that they will stand forever absent a storm of proportions not contemplated—whatever that means.[13] Of more immediate concern, the Court of Appeals' rejection of the Item 9 warranty disclaimer and its refusal to apply the damage limitation provision could seriously impact the Petitioner in the pending consequential damage action brought by Respondent's two television stations. (See fn. 2 at page 3 above)

III. The Court Of Appeals Violated Basic Principles Of Appellate Review In This Case

The judicial performance of the Court of Appeals in this case makes a mockery of Petitioner's right to have the trial record scrutinized by an impartial court of review within the context of issues framed by the parties. The foregoing illustrates beyond any doubt that the decision rendered by the Court was, for all practical purposes, arrived at in a total vacuum without the benefit of any written or oral ventilation by the parties.

A reviewing court is not free to reshape the case presented to it. Cases must be decided on the basis of the facts developed at trial and the issues presented to the reviewing court, not on the basis of theories for which the reviewing court assumes evidence could have been provided. This concept, central to our adversary system, was outlined by this Court in *Hormel* v. *Helvering*, 312 U.S. 552 (1941):

[13] The Opinion states that the 6 month warranty limitation in Item 9 is inapplicable to the express warranty found outside the written contract, because it applies only to warranties contained in the contract. This reasoning does not establish that this warranty was still in effect because the U.C.C. provides that, in the absence of express language, all warranties—whether in a contract or not—last only 4 years. See *Binkley Co.* v. *Teledyne Mid-America Corp.*, 333 F.Supp. 1183, *aff'd.*, 460 F.2d 276 (8th Cir. 1972), and the discussion in Petitioner's Brief, A-195 to 198.

> "Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprise on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." (312 U.S. at 556)

The Court of Appeals ignored its own rules in deciding this case. One of the underlying purposes of Rule 28 of the Federal Rules of Appellate Procedure is to establish the scope of the appeal so that the reviewing court will have before it precisely what errors the Appellant claims and the reasons why the Appellee believes no errors were committed and why the verdict should be affirmed. Proper judicial administration—let alone basic fairness to the parties—dictates that there be a semblance of order to the appellate process. In *Smith* v. *American Guild of Variety Artists*, 368 F.2d 511 (8th Cir. 1966), cert. denied, 387 U.S. 931 (1967), the Court of Appeals for the Eighth Circuit acknowledged that the briefs of the parties should control the scope of the court's review.

> "Questions not raised, briefed nor argued will ordinarily be given no consideration by an appellate court. *Trailmobile Co.* v. *Whirls*, 331 U.S. 40, 50, 67 S.Ct. 982, 91 L.Ed. 1328; *Pacific States Box & Basket Co.* v. *White*, 296 U.S. 176, 186, 56 S.Ct. 159, 80 L.Ed. 138.
>
> * * *
>
> We believe that this case falls within the general rule to the effect that issues not raised in the trial court or upon appeal cannot be considered." (368 F.2d at 514-15)

The Court of Appeals for the Seventh Circuit expressed the rule in even stronger terms. In *United States* v. *White*, 454 F.2d 435 (7th Cir.), cert. denied, 406 U.S. 962 (1972), the court said:

> "Rule 28 of the Federal Rules of Appellate Procedure (28 U.S.C. Rules) has been interpreted to require that all issues be set out in the appellant's brief and the respondent's answer, and failure to comply may constitute a waiver." (454 F.2d at 439)

The Court of Appeals apparently forgot about this Rule because it totally ignored the issues as framed by the parties and decided the appeal solely on its own perception of the facts and law.

In the rare instances when consideration of the issues not briefed to the reviewing court and fully litigated below is appropriate, the reviewing court should not proceed without the benefit of arguments from the parties. In *Spokane County* v. *Air Base Housing, Inc.*, 304 F.2d 494 (9th Cir. 1962), the court made this observation:

> ". . . appellee may support the judgment by any reasoning from facts disclosed in the record, no matter when the objection is raised, although the appellant must of course have an opportunity to answer." (304 F.2d at 497)

When, as here, a reviewing court develops its own legal theory for a case, and proceeds to base its decision upon it, the parties are deprived of an opportunity to demonstrate to the court the flaws of its reasoning. Errors of fact or law are invariably made to the prejudice of at least one party and to the detriment of our entire judicial system.

IV. Petitioner Was Denied Its Right To A Jury Trial By The Disposition Of This Case In The Court Of Appeals

One of the dangers in allowing appellate courts to reshape the issues is that in doing so the courts will proceed to determine the facts necessary to support those theories and thereby usurp the function of the trier of facts. This Court has cautioned against the exercise of such power. In *Securities*

Exchange Comm'n. v. *Chenery Corp.*, 318 U.S. 80 (1943), Mr. Justice Frankfurter said:

> "But it is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury." (318 U.S. at 88)

Litigants, like Petitioner, have a right under the Seventh Amendment to a determination by a jury of the claim alleged against it. When a reviewing court bases its decision on facts not determined at trial, as the Court of Appeals did in this case, this constitutionally protected right is seriously abridged. As observed in *Securities Investor Protection Corp.* v. *Morgan, Kennedy & Co.*, 533 F.2d 1314 (2nd Cir.), cert. denied, 426 U.S. 936 (1976):

> "The Supreme Court has cautioned against the consideration, on review, of issues not reached by the lower court and not adequately presented in the reviewing tribunal. . . . Where, as here, there may be a need for findings of fact before a decision can be rendered, that caution takes on added dimension. [Citations omitted.] (533 F.2d at 1322)

But the Court of Appeals decided this case by developing its own "theory" of the case, and by manipulating the facts and the law to make that theory superficially defensible.

One fact essential to the Court of Appeals' theory is that the advertising brochures created a warranty. Whether extra-contractual statements can rise to the stature of an express warranty is a question of fact for the jury. That question cannot be determined by either the trial court on a motion for summary judgment, or by a reviewing court considering the question for the first time on appeal. See, e.g., *Matlack, Inc.* v.

Rupp Corporation, 57 F.R.D. 151, 156 (E.D. Pa. 1972), *Pacific Marine Schwabacher, Inc.* v. *Hydroswift Corp.,* 525 P.2d 615 (Utah 1974); *Sinka* v. *Northern Commercial Co.,* 9 U.C.C. Rep. 1350 (Alas. 1971); *Putensen* v. *Clay Adams, Inc.,* 91 Cal. Rptr. 319 (1st Dist. 1970); *Alan Wood Steel Co.* v. *Capital Equipment Enterprises, Inc.,* 39 Ill.App.3d 48, 349 N.E.2d 627 (1976).

As stated earlier, the question of whether an extra-contractual warranty has been created is predicated on the initial finding that the contract is deficient, either because it is vague or ambiguous, or because it fails to be a final and integrated expression of the parties' intent. Even when that preliminary determination has been made, that question may only be taken from the jury when there is "no room for reasonable doubt" as to the warranty's existence. In *Gillette Dairy, Inc.* v. *Hydrotex Industries, Inc.,* 440 F.2d 969 (8th Cir. 1971), the Court of Appeals held that "the question of whether the warranties on the sales invoices were affirmations of fact which became part of the basis of the bargain was properly submitted to the jury," because "the evidence was not so predominant as to the existence of the express warranties to take this issue from the jury." (440 F.2d at 974)

Under the circumstances presented here, it is pure fantasy to suggest that the jury did or even could have made the factual determinations necessary to support the theory advanced by the Court of Appeals. The brochures were consulted prior to the negotiation of the first contract in 1966, but not during the negotiations for the second contract. Respondent's only witness on the subject described the brochures as "propaganda sheets." The jury was told by the District Court that the advertising literature would be "superseded" by the contract. Finally, there was no instruction suggesting that the jury could consider the advertising statements as warranties without regard to the warranty disclaimer contained in Item 9 of the contract or otherwise.

The Court of Appeals acted beyond the scope of its proper role as a reviewing court when it—not the jury—found that the advertising brochures were part of the bargain; that they were relied upon; that certain language in the brochures constituted an express warranty, which was not nullified by Item 9; that ice and wind had caused the tower to collapse and that this was a breach of warranty. Such action constitutes a clear denial of Petitioner's right to a determination of its case by a jury as guaranteed by the Seventh Amendment and this Court should not condone this manifest injustice.

V. The Court of Appeals' Decision Leaves Commercial Transactions In A State of Uncertainty

The Uniform Commercial Code, now adopted in almost all the states, was intended to establish uniformity and certainty for increasingly complex business transactions which now predominate our economy. To accomplish this goal, the Code reinforces the sanctity of contract as the desirable vehicle with which to formulate the multitude of responsibilities and risks present in sophisticated business dealings. Section 1-102 of the Code states as follows:

> "(2) Underlying purposes and policies of this Act are
>
> (a) to simplify, clarify and modernize the law governing commercial transactions;
>
> (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
>
> (c) to make uniform the law among the various jurisdictions."

The decision by the Court of Appeals reflects a total disregard for what was the *actual* as opposed to the judicially presumed agreement between the parties. The rhetoric of the Opinion reveals an alarming lack of judicial sensitivity for what transpires in the real world of business. For example, when the

Court theorizes that the brochures exchanged by the parties several years before the sale in question were part of the "fabric" of their agreement and must be read in "tandem" with and considered part of the "basis of the bargain" between the parties, it is fantasizing in order to justify a judicial reformation of a complete and integrated contract in which the parties allocated their respective risks at the time the transaction was consummated. The Court is simply deluding itself, to justify a result, when it suggests that either Petitioner or Respondent "intended"—or for that matter even considered for a moment—that the brochures were part of their bargain.

We cannot resist calling this Court's attention to an expression of policy made by the same panel that decided this case. In *Geldermann and Co.* v. *Lane Processing, Inc.*, 527 F.2d 571 (8th Cir. 1975) Chief Judge Gibson joined by Judges Lay and Stephenson, said:

> "It is not the province of the courts to scrutinize all contracts with a paternalistic attitude and summarily conclude that they are partially or totally unenforceable merely because an aggrieved party believes that the contract has subsequently proved to be unfair or less beneficial than anticipated." (527 F.2d at 576)

It is difficult to comprehend what would cause three judges to change so dramatically their legal philosophy. The Chief Judge obviously had second thoughts and ultimately perceived the case, at least partially, in its proper context and recognized the inherent danger of after the fact judicial intrusion into delicately negotiated commercial transactions. This was not a consumer dispute or one between a corporate giant and its intimidated customer. Rather—as the Chief Judge correctly observed—this is a controversy between:

> "two substantial commercial corporate entities, experienced in the technical world of broadcasting. They had dealt with one another before and were aware of the risk that broadcast towers entail and that towers sometimes fall."

One can only speculate about the impact of this decision—and the philosophy underlying it—on the business community. What more could a seller do to disclaim extra-contractual warranties than what Petitioner did here? Large bold face type appearing immediately above the signature line of the purchaser seems more than an adequate expression of the parties intent.

In the same vein, how does a seller of expensive and complex equipment in our inflationary economy bargain for a limit on its financial exposure? Again, the Petitioner bargained for what was, at the time of the transaction, a mutual understanding regarding the allocation of this risk. It now finds that the judiciary does not agree.

Terms governing warranties and the scope of financial loss unquestionably have a direct bearing on the price of the goods sold. In fact, the competitor of Petitioner who installed Respondent's third tower testified that he would not have sold the tower to Respondent without such terms and conditions. (A-46) If sellers cannot effectively negotiate terms and conditions with a sense of certainty that the courts will enforce them, they will have no recourse but to reflect that risk in the price or to refrain entirely from the development of complex equipment.

Respondent chose to pay a price for the tower which it knew was predicated on the assumption of certain risks. Having paid that price it should not be allowed to reap the benefits of an entirely rewritten agreement. To allow the judiciary to intrude itself into such commercial transactions in the manner and under the circumstances portrayed herein provokes a policy question of the highest magnitude affecting the very stability of our economy. It is a question, we respectfully suggest, that is deserving of this Court's attention.

VI. This Court Should Exercise Its Responsibility To Supervise The Administration Of Justice In The Federal Courts

Supervision of the Federal courts and the safeguarding of the integrity of the appellate process is ultimately entrusted to this tribunal. In fulfillment of this responsibility, this Court in the past has exercised its certiorari jurisdiction to correct manifest injustices arising out of substantial departures from ordinary appellate practice. In *Lutcher & Moore Lumber Co.* v. *Knight,* 217 U.S. 257 (1910), this Court exercised its certiorari jurisdiction and remanded the case to the appellate court with instructions to consider the case presented to it—not the case as the court had preferred to view it. There, the trial court had refused to admit certain evidence. The Appellate Court affirmed this ruling, but on grounds obviously contrary to the trial court's understanding of the case. This Court stated that:

> "in a case like this we think the judgment of the Circuit Court of Appeals must be reversed and the case be remanded to that court to the end that the duty to hear and decide it may be performed." (217 U.S. at 268)

Again, in *Fountain* v. *Filson,* 336 U.S. 681 (1949), this Court took action when a court of appeals entered a judgment based on theories not litigated at trial and for which the facts had not been fully developed. There, the court of appeals reversed summary judgment for the defendant, but then entered summary judgment for the plaintiff in a suit over title to realty. This Court reversed and remanded saying:

> "[H]ere the order was made on appeal on a new issue as to which the opposite party had no opportunity to present a defense before the trial court. . . . There was no occasion in the trial court for [the defendant] to dispute facts material [to the theory of the court of appeals], since the only claim considered by that court was the claim [on which the judgment below had been based] . . . [I]t was error . . . to deprive [defendant] of an opportunity to dispute facts material to that claim . . ." (336 U.S. at 683)

We respectfully suggest that the same factors which motivated this Court to reverse and remand in *Lutcher* and *Fountain* are present and equally compelling here. The Court of Appeals assumed the role of advocate, judge and jury in this case. To suggest, under those circumstances, that Petitioner was afforded its minimal rights as a litigant is a rationalization without reason and a delusion with potentially dangerous consequences. When a court of appeals so radically departs from accepted appellate practice and impinges so acutely upon a party's rights, this Court should exercise its power of supervision to remind the Court of Appeals that its prerogatives are not unlimited and to re-establish the faith which litigants should have in the integrity of the adversary process.

CONCLUSION

The actions of the Court of Appeals in this case pose a serious threat to the proper administration of justice in the federal courts. Obviously, Petitioner is motivated in pursuing the matter this far by the financial impact which the decision has on its business both now and in the future. It is equally disturbed, however, as part of the business community, by the philosophy underlying the decision which suggests that a court may intrude itself into a commercial transaction and virtually rewrite the parties' agreement in order to justify a given result. The business community of this country should not be subjected to such judicial excess or, if it is to be, then it should come expressly from this Court. Accordingly, Petitioner respectfully

urges that a Writ of Certiorari be granted to review the decision rendered by the Court of Appeals for the Eighth Circuit.

Dated: March 8, 1979

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APPENDIX A

A-1

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 77-1750

Community Television Services, Inc., a Corporation, Appellee,	*	
v.	*	Appeal from the United States District Court for the District of South Dakota.
Dresser Industries, Inc., a Corporation, Appellant.	*	

Submitted: February 17, 1978

Filed: September 13, 1978

Before GIBSON, Chief Judge, LAY and STEPHENSON, Circuit Judges.

LAY, Circuit Judge.

Dresser Industries, Inc. appeals from a judgment of the district court in the sum of $1,274,631.60,[1] awarded to Community Television Services, Inc. for damages arising from the collapse of a 2,000 foot television and radio broadcasting tower on January 11, 1975. Dresser designed, manufactured, and erected the tower for Community. The jury, answering special interrogatories, rejected Community's alternative claims of negligence and strict liability, but

[1] The jury actually assessed damages in the amount of $1,385,001.61. The trial court conditioned denial of Dresser's motion for judgment notwithstanding the verdict or in the alternative for new trial on remittitur of the damage award to the amount of the judgment. Community does not challenge the remittitur on appeal. See Community Television Serv. v. Dresser Ind., Inc., 435 F. Supp. 214 (D. S.D. 1977).

found for Community under breach of express warranty.[2] On appeal, Dresser argues that: (1) the verdict for Community is not supported by the evidence, and (2) the trial court erred in failing to enforce the limitation of liability provisions of the sale contract. Upon review of the entire record, we affirm the judgment for Community.

Background.

Community Television Services, Inc. is a corporate entity formed in about 1965 by two South Dakota based broadcasting stations, KELO and KSOO, for construction near Rowena, South Dakota, of a 2,000 foot tower to broadcast television signals for both stations. Contract negotiations were entered into with Dresser, who fabricated and erected the tower. The tower became operational in August of 1967. On June 22, 1968, the tower collapsed when an airplane clipped and severed a supporting cable. Dresser erected a replacement tower, which became operational in May of 1969. Included in the terms and conditions of the contract between Dresser and Community for the replacement tower was the warranty and limitation of liability provision at issue in this appeal. The only significant variance between the two contracts was an increase in the tower's price in 1968 to $385,000.

A relatively thin metal structure, the tower was comprised of a mast and three interconnected legs held in balance by guy cables set to an appropriate tension. An

[2]At the close of all the evidence, the trial court granted Dresser's motion for directed verdict on the implied warranty count, holding that disclaimer provisions in the sale contract complied with the South Dakota Commercial Code and were effective against implied warranties.

antenna was placed on top of the tower for broadcasting television and FM radio signals. Community had the tower regularly inspected and properly maintained. The only significant maintenance operation was retensioning of certain guy cables by an independent contractor retained by Community.

On January 10 and 11, 1975, a severe winter blizzard occurred in the area where the tower was located. During the early morning hours of January 11, as the storm reached its height with wind speeds near the top of the tower of up to 80 miles per hour, the tower collapsed. Expert witnesses called by both sides differed in their opinions as to the cause of the collapse. Community's experts testified that they had eliminated metallurgical or mechanical failure or abnormal wind loading as the cause of collapse. They theorized that the cause was high winds setting up a phenomenon known as mechanical resonance. They concluded that because of the resonance, the tower members "were inadequate to support the load that they sustained." On the other hand, Dresser's experts testified that a combination of ice, snow and wind subjected the tower to a total force greater than the ultimate capacity of its structural elements. They theorized that a substantial accumulation of rime ice[3] on the upper fourth of the tower enlarged the tower surface area exposed to the wind, thereby subjecting the tower members to a greater load than their designed wind loading capacity. Community attempted to refute Dresser's rime ice theory by calling several witnesses who testified that they did not see any such ice on or near the area where the tower

[3]Rime ice is formed when water droplets, existing in clouds at temperatures below freezing, instantaneously crystallize and freeze as they collide with a structure. In contrast to the more dense and clear glaze ice, rime ice is virtually indistinguishable from snow.

collapsed. In turn, Dresser countered Community's theory through expert testimony that relatively constant winds were necessary for resonance to begin, and the winds were gusty and varied in speed and direction at the time of collapse. Furthermore, Dresser argued that the warranty did not guarantee against mechanical resonance, and experts testified that its prevention was beyond the current state of the art.

Creation and Scope of the Warranty.

The specifications incorporated in the sale contract included a specified "Design Wind Load," which set forth the tower's capacity to withstand wind velocity as measured in pounds of pressure per square foot against the flat surfaces of its members. The specification reads: "The tower shall be designed to resist a uniform wind load per drawing T-5172, sheet S-1, 60 psf on flats." The trial court instructed the jury that this specification constituted an express warranty that the structure would withstand wind exerting pressure of 60 pounds per square foot on the flat surfaces of the tower.[4] Dresser's advertising materials and the testimony

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[4]U.C.C. § 2-313(a), (b), which was enacted by South Dakota without change, S.D. Compiled Laws Ann. § 57-4-25, 26 & 27 provides:

> Sec. 2-313. Express Warranties by Affirmation, Promise, Description, Sample.
>
> (1) Express warranties by the seller are created as follows:
>
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> (b) Any description of the goods which is

of experts at trial revealed that the wind velocity necessary to create 60 pounds of pressure on the flat surfaces of the tower would be approximately 120 miles per hour. The evidence showed that the wind loading specifications referred, at least in engineering parlance, to "a force caused by the wind that is introduced parallel to the ground . . . [which] would be tending to blow the structure over."[5]

Dresser argues that the trial court erred in failing to direct a verdict on the express warranty claim or grant it

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4 (continued)

> made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

Dresser concedes on appeal that the specification created an express warranty.

[5]The mathematical formula to compute the wind velocity necessary to exert 60 pounds of pressure per square foot is not contested and was described by one of Community's experts as follows:

> A. The density of air at sea level, using a standard atmosphere, is computed to be .002378 slugs per cubic foot, and if we use 60 pounds per square foot, that would be equal to then one-half this .002378 times the square of the air velocity in feet per second, so if we compute it back the other way, it would be -- I read that that would be about 224.6 feet per second in that case for a 60 psf load, and if we converted that to miles per hour, that would be about 153, I believe.
>
> Q. All right. That's 153 miles an hour?
>
> A. Yes.

This was described as a conservative figure, the highest wind speed that could exert 60 pounds of pressure. Lower speeds, such as the 120 miles per hour speed given in Dresser's advertising catalog, apparently result from use of a different figure for density, .003 or .004, in the equation.

judgment notwithstanding the verdict, because expert testimony that the tower met the design specification was uncontradicted. Community's own experts stated unequivocally that in their opinion the tower conformed in a mathematical or analytical sense to the 60 pounds per square foot wind loading specification. If the warranty may be restricted to the technical specification set forth in the written contract, we would find Dresser's argument convincing. However, we agree with Community that the warranty was amplified, in advertising materials Dresser gave to Community prior to purchase of the first tower, to promise more than mere compliance with technical measurements. In an advertising catalog, Dresser made the following supplementary affirmation:

> Wind force creates the most critical loads to which a tower is normally subjected. When ice forms on tower members thereby increasing the surface area resisting the passage of wind, the load is increased.
>
> Properly designed towers will safely withstand the maximum wind velocities and ice loads to which they are likely to be subjected. Dresser-Ideco can make wind and ice load recommendations to you for your area based on U. S. Weather Bureau data.[6]

Although we agree with Dresser that a seller cannot be held to be the insurer of its product, Dresser nevertheless

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[6] On another page, in a description of the towers, the following language appears:

> In the winter, loaded with ice and hammered repeatedly with gale force winds, these towers absorb some of the roughest punishment that towers take anywhere in the country . . . yet continue to give dependable, uninterrupted service.

provided the catalog to Community to induce purchase of its product, and in the absence of clear affirmative proof to the contrary, the above affirmation must be considered part of the "basis of the bargain." S. D. Compiled Laws Ann. § 57-4-26; Comment 3 to U.C.C. § 2-313; Drier v. Perfection, Inc., ___ S.D. ___, 259 N.W.2d 496, 502 (1977); Hawkins Construction Co. v. Matthews Co., 190 Neb. 546, 565, 209 N.W.2d 643, 654 (1973). Standing alone, the statements provide a warranty that Dresser's tower would be properly designed so as to safely withstand the maximum wind velocities and ice loads to which it would likely be subjected. Dresser did not indicate that this broad affirmation was superseded or cancelled by the technical specification in the contract. Cf. Braniff Airways, Inc. v. Curtiss-Wright Corp., 411 F.2d 451, 455 (2d Cir.), cert. denied, 396 U.S. 959 (1969), 400 U.S. 829 (1970). When the affirmation is read in tandem with the contract, as part of the "fabric" of the agreement of the parties, see Comment 3 to U.C.C. § 2-313, it enlarges the warranty created by the technical wind loading specification, giving evidence of its full intent and scope. See Collins v. Uniroyal, Inc., 126 N.J.Super. 401, 315 A.2d 30 (1973), aff'd 64 N.J. 260, 315 A.2d 16 (1974); Fargo Mach. & Tool Co. v. Kearney & Trecker Corp., 428 F. Supp. 364, 371 (E.D. Mich. 1977).

We find that the statements in the advertising catalog, which supplement the wind loading specification, could reasonably have been found by the jury to be an affirmation of fact or a promise concerning the actual durability or performance of the tower during the wind and ice storms to which it was likely to be subjected.

Proof of Breach.

Although Dresser's defense was that the tower collapsed

by reason of excessive loading due to ice on the tower members, no disclaimer or limitation of the warranty that a properly designed tower would safely withstand the maximum wind and ice loads to which it was likely to be subjected appeared in the advertising materials or the contract. Under the integrated warranty given, a purchaser could reasonably assume that the tower, if properly designed for its location, would withstand maximum wind speeds to which it was likely to be subjected, even if ice accumulated on the tower members. While the blizzard was a severe one, the evidence does not support the conclusion that the wind alone, or the combination of wind and ice which Dresser claimed caused the collapse, was not within the range of storm conditions to be reasonably contemplated for the tower's location.[7] Breach of a warranty created by statements describing the specific capacity of goods is proved when the product is shown by direct or circumstantial evidence to have failed to perform reasonably and safely the function for which it was intended by the manufacturer. Drier v. Perfection, Inc., supra, 259 N.W.2d at 504; see also Swenson v. Chevron Chemical Co., ___ S.D. ___, 234 N.W.2d 38, 42-43 (1975); S-C Industries v. American Hydroponics System, Inc., 468 F.2d 852, 855 (5th Cir. 1972). In view of the affirmation made in the catalog, there was sufficient evidence for the jury to reasonably find that the tower was not as durable as it was warranted to be.[8]

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[7]The trial judge surmised that the jury did not believe that ice and snow were a contributing factor in the collapse. The findings of the jury, however, are inherent in its verdict, and a court's inquiry must simply be whether there exists substantial evidence to sustain the verdict.

[8]Proof of a specific defect was not essential to Community's recovery on the breach of express warranty count. Drier v. Perfection, Inc., supra 259 N.W.2d at 504.

Viewing the evidence in the light most favorable to Community, and assuming all conflicts in the evidence were resolved by the jury in Community's favor, Griggs v. Firestone Tire & Rubber Co., 513 F.2d 851, 857 (8th Cir.), cert. denied, 423 U.S. 865 (1975); Heiser v. Rodway, ___ S.D. ___, 247 N.W.2d 65, 68-69 (1976), we conclude that there is sufficient evidence to support the jury's finding of breach of express warranty.

Contractual Limitation of Liability.

On the back of each page of the two-page sale contract is a printed form entitled "Terms and Conditions of Sale," which includes a warranty and limitation of liability clause, hereafter referred to as item nine. Dresser contends that this clause precludes it from incurring any liability for breach, or alternatively, limits its liability to the purchase price of the tower -- $385,000 less depreciation.[9]

In item nine, Dresser warrants that its product will be free of defects in material and workmanship and will meet applicable specifications. The warranty is limited to those defects for which the buyer submits a written claim immediately upon discovery, and in any event, within six months from final acceptance. The buyer's remedies for breach of the warranty are limited to repair, replacement, or

---

[9]Community actually recovered $950,295.24 for replacement cost less depreciation of the tower and $324,339.36 for replacement cost less depreciation of the antenna and adjacent buildings, for a total judgment of $1,274,631.60. The standard measure of damages, difference in value as accepted and as warranted, S.D. Compiled Laws Ann. § 57-8-36, was not used. Dresser does not challenge the manner of calculating damages.

refund of an equitable portion of the purchase price of any product Dresser determines to be defective or finds failed to meet applicable specifications. Dresser has the sole option of deciding which remedy it will provide. Item nine states that this limited warranty is in lieu of all other warranties, and the purchase price is based on the limitation of Dresser's liability and the buyer's waiver of any claim for damages.[10]

---

[10]Item 9 provides in part:

> 9. WARRANTY AND LIMITATION OF LIABILITY: Seller warrants, for a period of six months, that products of its own manufacture and any construction performed hereunder by the Seller shall meet the applicable specifications incorporated in this contract, and be free from defects in material and workmanship. Provided Buyer submits a claim in writing to Seller immediately upon its discovery and in any event within six (6) months after shipment if no construction is performed hereunder or within six (6) months after final acceptance by Buyer if construction is performed (or within six months from notification of completion by Seller if Buyer wrongfully refuses or delays final acceptance), Seller shall, at Seller's sole option, repair, replace or refund an equitable portion of the purchase price of any product or work which Seller determines to have been defective or failed to meet applicable specifications. . . .
>
> Except for obligations expressly and specifically assumed under the other clauses of these Sales Terms, the foregoing is Seller's only warranty, obligation, and liability, under tort (including alleged negligence) contract or otherwise for or in connection with its products, work and services or use thereof. THE FOREGOING IS EXPRESSLY IN LIEU OF ALL OTHER WARRANTIES WHATSOEVER, EXPRESS, IMPLIED AND STATUTORY, INCLUDING WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS. IT IS SPECIFICALLY UNDERSTOOD SELLER'S PRICE IS BASED UPON THE FOREGOING LIMITATION OF LIABILITY AND BUYER'S WAIVER OF ANY AND ALL CLAIMS FOR DAMAGES.

The trial court refused to enforce the limitations of Dresser's liability set forth in item nine. Judge Nichol specifically held that the six month period was a "manifestly unreasonable" time for discovery and notification of breach under Section 57-1-14 of the South Dakota Commercial Code, in light of the tower's twenty-five year average useful life.[11] Dresser argues that under the South Dakota Commercial Code, a seller's warranty does not extend to future performance absent explicit agreement to the contrary. See generally, Binkley Co. v. Teledyne Mid-America Corp., 460 F.2d 276 (8th Cir. 1972). Dresser also contends that the six month discovery period is a reasonable commercial agreement on when to transfer risk to the buyer, based on inspection and maintenance obligations. In the alternative, if six months is an unreasonably short period of time to transfer risk, Dresser argues that five years -- the time lapse from erection of the tower to notice of collapse -- is an unreasonably long period, and the trial court should have set a reasonable time.[12] In addition, Dresser urges that the limitation of remedy provision in item nine provided the buyer with a reasonable and adequate remedy, which contrary to the trial court's finding, did not fail of its "essential purpose." South Dakota Compiled Laws Ann. § 57-8-50; U.C.C.

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[11]Section 57-1-14, which is identical to U.C.C. § 1-204(1), provides in part:

> Whenever this title requires any action to be taken within a reasonable time, any time which is not manifestly unreasonable may be fixed by agreement. What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action.

[12]We note the defense of the statute of limitations was not raised in the pleadings and is not argued on appeal as such.

§ 2-719(2). Dresser contends that the trial court's holding, particularly as it affects the limited remedy agreed upon by Community and Dresser, will create serious problems in enforcement of commercial agreements between parties with relatively equal bargaining power.

We conclude that it is not necessary to review the trial court's holding that the contractual clauses limiting liability and remedy were invalid. We find that the limitation clauses apply only to the limited and purportedly exclusive warranty set forth in item nine, and not to the broader warranty created by the affirmation made in Dresser's advertising materials.

The six month notification period relates to the warranty that Dresser's products and construction "shall meet the applicable specifications incorporated in this contract, and be free from defects in material and workmanship." Similarly, the limitation of remedy provision applies to "any product or work which seller determines to have been defective or failed to meet applicable specifications." In attempting to assert the clauses within item nine as a defense, Dresser overlooks the fact that the jury found Dresser was not liable on the negligence and strict liability counts. Thus, the jury did not find that Dresser's product or construction was defective in materials or workmanship or failed to meet the applicable specifications. See McIntyre v. Everest & Jennings, Inc., 575 F.2d 155, 159 (8th Cir. 1978). Indeed, if the advertising materials were omitted from the bargain, we would be constrained to agree with Dresser that the undisputed evidence showed that the technical 60 psf wind loading design specification was met.

However, Dresser's affirmation in its advertising

catalog went beyond the limited warranty in the written contract and created a promise concerning the tower's durability much broader than mere compliance with the 60 psf specification. Dresser promised Community that a nondefective, properly designed tower would "safely withstand the maximum wind velocity and ice storms to which [it is] likely to be subjected." This broad warranty of performance clearly falls outside the limited warranty provided in item nine. Cf. S-C Industries v. American Hydroponics System, Inc., supra, 468 F.2d at 855; Fargo Mach. & Tool Co. v. Kearney & Trecker Corp., supra, 428 F. Supp. at 371. Thus, the jury could reasonably have found that the tower was not defective in materials or workmanship and met the technical specifications, but did not live up to its promised performance capacity.

Item nine does not limit the duration of the express warranty of durability or performance evident from the overall agreement of the parties as evidenced by the catalog, nor limit remedy for its breach. S-C Industries v. American Hydroponics System, Inc., supra, 468 F.2d at 855. Nor does the general disclaimer of all warranties other than the limited one set forth in item nine restrict Community's right to recover. Under Section 57-4-34 of the South Dakota Commercial Code,[13] language which limits or negates an

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[13] S.D. Compiled Laws Ann. § 57-4-34, U.C.C. § 2-316(1), provides:

> Construction of words or conduct tending to negate or limit express warranty inoperative. Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of chapter 57-3 on parol or extrinsic evidence (§ 57-3-4) negation or limitation is inoperative to the extent that such construction is unreasonable.

express warranty is inoperative when it cannot reasonably be construed consistently with language which creates the warranty. If the limited warranty were exclusive, it would limit the wind loading specification to its technical content and negate the express warranty of durability or performance. In S-C Industries v. American Hydroponics System, Inc., supra, a seller argued that a printed special warranty against defects similar to the one in question here, which stated that it superseded all other warranties, precluded recovery for breach of a specific express warranty created by technical loading specifications. The court stated:

> The general language of that special warranty does not mention the written express warranty which [seller] had given [buyer]. The only reasonable interpretation that can be placed on this special warranty in light of the prior specific warranty, is that it applies only to any defects which might be found to exist in the various components and other materials which [seller] sold. Thus, while the special warranty form provided the exclusive remedy should any component be defective, it did not supersede the specific express warranty which extended to the design capability of nondefective structural members intended to perform as an integral part of the greenhouse building.

468 F.2d at 855.

We conclude that there is sufficient evidence to support the finding that Dresser breached its warranty that the tower, when free from defects in materials and workmanship and properly designed for its location, would withstand the wind and ice loads to which it would normally be subjected. The terms and conditions of sale in the written contract do not apply to the warranty, and therefore cannot limit Dresser's liability for its breach.

Accordingly, the judgment is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

United States Court of Appeals.

FOR THE EIGHTH CIRCUIT

No. 77-1750

RECEIVED
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ROBERT W. PATTERSON

Community Television Services, Inc., a corporation,

Appellee,

v.

Dresser Industries, Inc., a corporation,

Appellant.

Appeal from the United States District Court for the District of South Dakota

Filed: November 24, 1978

ORDER DENYING REHEARING EN BANC

The petition for rehearing en banc is denied. Judges Lay, Heaney, Stephenson, Henley, and McMillian vote to deny the petition. Judges Gibson, Bright, and Ross vote to grant the petition.

GIBSON, Chief Judge. (Judge Bright and Judge Ross join in the following dissent.)

I respectfully dissent from the denial of a rehearing en banc. Upon greater reflection it appears that the panel opinion contains two areas of difficulty. First, it finds liability based on supposed warranties contained in a catalog distributed years before the parties contracted for construction of this tower. Second, it refuses to enforce contractual

clauses limiting Dresser's liability to the repair or replacement of the tower, or refund of the purchase price.

In my view, the evidence was sufficient to uphold the jury verdict of liability based on breach of the express warranty contained in the written contract. Since I believe the evidence supported a finding of liability on at least one theory, it would be counterproductive to rehear the question of liability.

Failure to enforce the clause limiting Dresser's liability, however, presents a serious question of injustice. The parties are two substantial commercial corporate entities, experienced in the technical world of broadcasting. They had dealt with one another before and were aware of the risk that broadcast towers entail and that towers sometimes fall. They also knew that construction costs of towers had been rising from year to year. Despite these facts, the parties entered into an agreement expressly providing that in the event of breach of warranty Dresser would, at Dresser's "sole option, repair, replace or refund an equitable portion of the purchase price of any product or work which seller determines to have been defective or failed to meet applicable specifications * * * ."

I cannot imagine any clearer agreement of the parties to limit the extent of liability. Nor can I say that the remedy fails its "essential purpose" or is "unconscionable."[1] To suppose that the limitation on remedy contained in the contract was intended to apply only to the warranties contained in the written agreement but not to those in the catalog, is

[1] The requirement that the buyer give notice of any defect within six months of completion stands on a different footing. If applied here it would result in the warranties and remedies failing their essential purposes and would be unconscionable.

to build a fantasy on top of a fiction.[2] Under U.C.C. § 2-719(1), S.D. Compiled Laws § 57-8-49, the parties are entitled to limit remedies. To further certainty in commercial relationships and justice between these parties, we ought to enforce the contract as written.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

[2]The panel opinion finds the catalog representations to be part of the "bargain." However, it refuses to acknowledge that in that case they become the "specifications" for the work. They are being applied by this court. In short, the catalog representations became the "applicable specifications" referred to in the written contract. Contra slip op. at 12.

APPENDIX C

Memorandum Decision

Civ 75-4056

Messrs. Ellsworth E. Evans and Deming Smith, of Davenport, Evans, Hurwitz & Smith, of Sioux Falls, South Dakota, appeared in behalf of the plaintiff;

and

Mr. Harold C. Doyle, of May, Johnson & Burke, of Sioux Falls, South Dakota, and Mr. G. Alan Cunningham, of Faegre & Benson, of Minneapolis, Minnesota, appeared in behalf of the defendant.

This is an action by a purchaser against a seller arising out of the collapse of a television and radio broadcasting tower. The case was tried to a jury, commencing on November 29, 1976, with the verdict rendered on December 17, 1976. The jury found in favor of plaintiff, and assessed damages in the amount of $1,385,001.61. This matter is now before the court on post-trial motions filed by defendant.

Defendant has submitted two motions, in the alterna-

tive. Initially, this court is requested to vacate the judgment for plaintiff and enter a judgment notwithstanding the verdict, finding for defendant. Alternatively, defendant requests a new trial on Count III of the complaint.

This case arose after plaintiff's 2000 foot[1] television and radio broadcasting tower collapsed during a blizzard, in the early hours of January 11, 1975. The tower, along with the antennas and cables attached to it, was totally destroyed. In addition, one building beneath the tower was demolished, and another was partially damaged.

The tower which collapsed had been purchased by plaintiff from defendant, which designed, manufactured, and erected it.[2] The specifications incorporated in the contract for sale disclosed that "The tower shall be designed to resist a uniform wind load per drawing T-5172, sheet S-1, 60 psf on flats." As the testimony and evidence presented at trial demonstrated, this specification contemplated the construction of a guyed tower which would withstand a force of 60 pounds per square foot on flat surfaces. Defendant's advertising brochure stated that the wind velocity necessary to create this amount of pressure would be approximately 120 miles per hour, absent any other factors.[3] This court found as a matter of law that this specification created an express warranty.

---

[1]The overall height of the tower and its appendages was 1,984 feet, but it was referred to throughout the trial as a "2000 foot" tower.

[2]The erection of the tower was performed by Allied Construction, which was retained by defendant for that purpose.

[3]The evidence and testimony in this case demonstrated that the presence of ice and snow, separately and in combination, on the tower would increase the size of the tower members exposed to the wind, and would therefore decrease the velocity of wind necessary to create the 60 pounds per square foot pressure. This fact was argued extensively to the jury by defendant. The jury apparently found that the presence of ice and snow on the tower at the time of collapse, if any, had been insufficient in amount to be a causal factor in the collapse.

Plaintiff proceeded on various theories of liability. The jury was ultimately instructed on negligence, strict liability in tort, and breach of express warranty. The jury's answers to the special interrogatories submitted to them by the court show that they based defendant's liability on a breach of the express warranty.

Defendant's first attack on the verdict addresses issues determined by this court as a matter of law during the course of the trial. Specifically, defendant takes issue with this court's findings that the six month warranty limitation was manifestly unreasonable, and that the remedies provided by the contract failed of their essential purpose. This court has carefully reconsidered these issues in light of the record and the briefs submitted by the parties, and is not persuaded to change its prior rulings.

Defendant's second argument focuses on the answers by the jury to the special interrogatories submitted by the court. Defendant alleges that the jury's answers are in irreconcilable conflict, and that for this reason the verdict should be set aside and a new trial granted. The court finds that this argument is not well founded.

Defendant contends that by finding no liability on the basis of negligence, and no liability on the basis of strict liability in tort, the jury was logically prevented from finding liability based on a breach of the express warranty. Defendant asserts that a findings of a "defect" is inherently involved under each of these theories, and that the jury could not find the tower "defective" for one theory and not for the others. Defendant argues that this alleged inconsistency necessitates a new trial.

This court has a duty to attempt to reconcile the special interrogatories with the general verdict, if possible, to

avoid invading the province of the jury. Wright & Miller, Federal Practice and Procedure, section 2513 (1971); *cf.* Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108, 119 (1963). The court has carefully reexamined the record in this case, and concludes that the answers to the special interrogatories are not inconsistent with themselves or with the general verdict upon the facts in the record.

While it may be true that each of the theories considered by the jury contemplates the finding of a "defect" in some sense, defendant's argument glosses over the other distinctive elements which each theory contains. Negligence requires a finding of a failure to adhere to a standard of care required by law. Strict liability in tort, as explained by section 402A of the Restatement of the Law, Torts, Second, requires a finding that the defect in the product rendered it unreasonably dangerous to the user or his property. *See* Engberg v. Ford Motor Co., 205 N.W. 2d 104 (S.D. 1973). As the comments to section 402A point out, even if a product is defective in some manner, that defect must render the product "unreasonably" dangerous. A product can be dangerous without being unreasonably dangerous. *See* Restatement of the Law, Torts, Second, section 402A, comment k.

An examination of the record convinces this court that the jury's finding is supported by the evidence, and that failure to find liability on the theories of negligence and strict liability in tort is not inconsistent with the particular facts in this case. A new trial is not mandated on this basis.

Defendant's final contention is that the jury did not properly determine the amount of damages to be awarded plaintiff, and that a new trial should be had on this issue. The court finds this contention meritorious.

The jury instruction relating to the measure of damages read:

> Now, plaintiff's damages may be ascertained by determining the cost of constructing a similar tower, replacing the antenna, repairing the damaged buildings, and deducting therefrom the depreciation suffered by reason of age and use, unless such cost is greater than the difference between the before and after value of the tower, antenna and buildings damaged, in which case the difference in market value before and after the collapse would be the proper measure of damages.

Under this instruction the jury was to award the lesser of diminution in market value or cost of replacement less depreciation, unless they found the two amounts to be equal. Plaintiff asserted throughout the trial that the amount of loss suffered by reason of the collapse of the tower could only be measured by the replacement cost less depreciation, owing to the special circumstances present in this case.

The South Dakota Supreme Court has recognized replacement cost minus depreciation as a proper measure of damages. Shaffer v. Honeywell, Inc., 249 N.W. 2d 251, 258 (S.D. 1976); *see also* Big Rock Mountain Corp. v. Stearns-Roger Corp., 388 F.2d 165 (8th Cir. 1968). South Dakota has also codified the measure of damages recoverable for a breach of warranty.

> The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the val-

> ue they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

SDCL 57-8-37 (1967). In addition, consequential damages are recoverable in this case, under this court's previously announced rulings. SDCL 57-8-40 (1967). The question in this case is what method of measuring damages should have been applied.

As the Eighth Circuit Court of Appeals noted in *Big Rock Mountain:*

> Where there is more than one method of estimating damages, that method which is most definite and certain should be adopted. No one method is exclusive where several exist, but that one should be chosen which best achieves the fundamental purpose of compensation to the injured person for his loss; and, if the facts show that either of two measures of damages will fully compensate plaintiff for his loss, that measure must be adopted which is less expensive to defendant.

388 F.2d 165, 170 (8th Cir. 1968) (quoting 25 C.J.S. Damages section 72 (1966)).

This court has carefully examined the record in this case in light of the general admonition that an injured party should be fully compensated for losses suffered through the fault of another, but that he should not be allowed a windfall. From this examination it is concluded that under the specific circumstances of this case plaintiff will be fully compensated for the injuries suffered only by measuring the cost of replacing and repairing the damaged

and destroyed structures and equipment, and subtracting therefrom a reasonable depreciation for the use plaintiff had enjoyed prior to the damage. Metropolitan Life Ins. Co. v. Farmers Co-operative Co., 2 N.W. 2d 665 (S.D. 1942); Shaffer v. Honeywell, Inc., 249 N.W. 2d 251 (S.D. 1976).

The jury assessed plaintiff's damages in the amount of $1,385,001.61. Although the jury was apparently attempting to calculate the amount of damage suffered by plaintiff through use of the replacement cost less depreciation approach, the amount ultimately awarded is not justified by the evidence. Viewing the evidence in the light most favorable to the plaintiff, the largest recovery justified by the evidence under the court's instructions was $1,274,631.60.[4] In light of this, the court finds the verdict excessive as a matter of law. The excessiveness of the verdict, however, is not so shocking as to indicate that it was the result of passion and prejudice on the part of the jury. This court is of the opinion that an unconditional new trial on the issue of damages is not warranted.

---

[4]This figure is arrived at through the use of plaintiff's exhibits 100 and 101. The replacement cost for the tower was $1,099,880.95. From this figure was subtracted $20,000.00, which represented the amount of betterment over the tower replaced due to some differences in the construction. From the remainder of $1,079,880.95 was subtracted $129,585.71, which represented depreciation of six years over a useful life of 50 years.

The replacement cost for the antenna was $343,338.93. From this was subtracted $8,000.00 for overstock returned to the manufacturer. From the remainder of $335,338.93, this court subtracted $50,300.86, which represents six years depreciation over a useful life of 40 years.

The repair and replacement costs on the buildings totalled $45,699.17. From this figure was subtracted $6,397.88, which represented seven years depreciation over a useful life of 50 years.

The total net depreciation replacement value arrived at in this manner for the tower, antenna, and buildings was $1,274,631.60.

It is well settled that a trial court may condition the denial of a motion for new trial in circumstances such as these on a remittitur by plaintiff. *See generally* Wright & Miller, Federal Practice and Procedure, section 2815 (1973), and cases cited therein. It is this court's opinion that in this case the only result which would be consistent with the Seventh Amendment would be to require plaintiff to remit the excess of the verdict over the maximum which the jury could have awarded under the evidence and instructions as a condition of the denial of defendant's motion for a new trial on the issue of damages. Wright & Miller, Federal Practice and Procedure, section 2815 (1973); *see also* Rice v. Union Pacific R. Co., 82 F. Supp. 1002 (D. Neb. 1949).

This court will, therefore, deny defendant's motion to vacate the judgment and to enter a judgment notwithstanding the verdict. Further, this court having determined that the verdict was excessive to the extent of $110,370.01, it will be ordered (1) that, if and upon the condition that, within thirty days of the entry of this memorandum decision, plaintiff, by one of its attorneys of record, shall serve upon opposing counsel and file in this case a remittitur of the sum of $110,370.01 upon the verdict found and returned herein and a release, to that extent only, of the judgment entered upon the verdict, the motion for a new trial be denied and the judgment confirmed for the remaining sum; but (2) that if such remittitur and release be not so served and filed within thirty days of the entry of this memorandum decision, the motion for a new trial be sustained, the judgment entered upon the verdict be vacated and cancelled, the verdict be set aside as to the issue of damages, and a new trial be granted in the case solely on the issue of damages.

Done and entered at Sioux Falls, South Dakota, this 27th day of July, 1977.

BY THE COURT:

/s/ FRED J. NICHOL
Chief Judge

Order Denying Defendant's Motion for Judgment Notwithstanding the Verdict and Denying New Trial on Condition of Remittitur of Damages

Civ. 75-4056

This cause came on to be heard on motion of the Defendant for judgment notwithstanding the verdict, or in the alternative for a new trial on Count III of the Complaint, and the Court having heard the argument of counsel and being fully advised, it is

ORDERED that Defendant's motion for judgment notwithstanding the verdict is denied.

The Court having determined that the verdict was excessive in the sum of $110,370.01,

IT IS FURTHER ORDERED (1) that if and upon condition that, on or before August 26, 1977, the Plaintiff, by one of its attorneys of record, shall serve upon opposing counsel and file in this case a remittitur of the sum of $110,370.01 upon the verdict found and returned herein, and a release, to that extent only, of the judgment entered upon the verdict, the motion for a new trial be, and the same hereby is, denied, and the judgment confirmed for the remaining sum, that is, $1,274,631.60; but (2) that if such remittitur and release be not so served and

filed on or before August 26, 1977, the motion for a new trial be sustained, the judgment entered upon the verdict be vacated and cancelled, the verdict be set aside as to the issue of damages, and a new trial be granted in the case solely on the issue of damages.

Dated this 8th day of August, 1977.

BY THE COURT:

FRED J. NICHOL
Chief Judge

ATTEST:
WILLIAM J. SRSTKA
Clerk
(Seal of Court)
By Nancy A. Nicolai
Deputy

Supreme Court, U. S.
FILED
MAR 8 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1978

No. 78-1376

DRESSER INDUSTRIES, INC.,
Petitioner,

v.

COMMUNITY TELEVISION SERVICES, INC.,
Respondent.

APPENDIX D

PETITION FOR WRIT OF CERTIORARI

HOPKINS, SUTTER, MULROY, DAVIS & CROMARTIE
THOMAS R. MULROY
ROBERT W. PATTERSON
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Suite 5200
Chicago, Illinois 60603

FAEGRE & BENSON
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MAY, JOHNSON, DOYLE, BECKER & FISHER, P.C.
HAROLD C. DOYLE
412 West Ninth Street
Sioux Falls, South Dakota 57104

Attorneys for Petitioner
Dresser Industries, Inc.

March 8, 1979

APPENDIX D

TABLE OF CONTENTS

Statutes and Authorities A-29

Excerpts from Trial Transcript A-36
- Direct Examination of Leo Heisel A-36
- Direct Examination of James Trotter A-44
- Argument on Dresser's Motion for Directed Verdict A-47
- Closing Argument of Community Television A-76
- Jury Instructions A-108

Briefs of Parties Below A-130
- Plaintiff's Post-Trial Brief A-130
- Appellant's Brief A-172
- Appellee's Brief A-220
- Appellant's Reply Brief A-270

Exhibit 2 ..... A-292

Contract for Sale of Tower A-308

APPENDIX D

STATUTES AND AUTHORITIES

Rules of the Supreme Court of the United States

Rule 19. Considerations governing review on certiorari

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari.

Federal Rules of Appellate Procedure

Rule 28. Briefs

(a) Brief of the Appellant. The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(1) A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited.

(2) A statement of the issues presented for review.

(3) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record (see subdivision (e)).

(4) An argument. The argument may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.

(5) A short conclusion stating the precise relief sought.

(b) Brief of the Appellee. The brief of the appellee shall conform to the requirements of subdivision (a)(1)—(4), except that a statement of the issues or of the case need not be made unless the appellee is dissatisfied with the statement of the appellant.

(c) Reply Brief. The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross appeal. No further briefs may be filed except with leave of court.

* * *

Uniform Commercial Code*

§ 1—102. Purposes; Rules of Construction; Variation by Agreement

(1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.

(2) Underlying purposes and policies of this Act are

(a) to simplify, clarify and modernize the law governing commercial transactions;

(b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;

(c) to make uniform the law among the various jurisdictions.

(3) The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

(4) The presence in certain provisions of this Act of the words "unless otherwise agreed" or words of similar import does not imply that the effect of other provisions may not be varied by agreement under subsection (3).

(5) In this Act unless the context otherwise requires

(a) words in the singular number include the plural, and in the plural include the singular;

(b) words of the masculine gender include the feminine and the neuter, and when the sense so indicates words of the neuter gender may refer to any gender.

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* South Dakota has enacted the Uniform Commercial Code without change.

§ 1—204. Time; Reasonable Time; "Seasonably"

(1) Whenever this Act requires any action to be taken within a reasonable time, any time which is not manifestly unreasonable may be fixed by agreement.

(2) What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action.

(3) An action is taken "seasonably" when it is taken at or within the time agreed or if no time is agreed at or within a reasonable time.

§ 2—313. Express Warranties by Affirmation, Promise, Description, Sample

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

§ 2—316. Exclusion or Modification of Warranties

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as

consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2—202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing of course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2—718 and 2—719).

§ 2—317. Cumulation and Conflict of Warranties Express or Implied

Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant. In ascertaining that intention the following rules apply:

(a) Exact or technical specifications displace an inconsistent sample or model or general language of description.

(b) A sample from an existing bulk displaces inconsistent general language of description.

(c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

§ 2—719. Contractual Modification or Limitation of Remedy

(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

§ 2—725. Statute of Limitations in Contracts for Sale

(1) In action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

(3) Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.

(4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this Act becomes effective.

EXCERPTS FROM TRIAL TRANSCRIPT

Direct Examination of Leo Heisel
by Mr. Evans

Trial Transcript at 11

Q. And with reference to the first tower, were you in on the negotiations for the purchase of the first tower?

A. Yes, I was.

Q. Was there anybody from Dresser that came out here to Sioux Falls to see you and the other personnel of the TV stations? A. Yes, this salesman and field engineer came out.

Q. What was the name of this man or men? A. The salesman was Mr. Bob McKinney.

Q. And anyone else that came out? A. Then their field engineer was Mr. Pat Irwin.

Q. Anyone else that you met from the Dresser Industries? A. At that time, no.

Q. Now we're back either in late '65 or early '66 when we're talking about the first tower, aren't we? A. Yes, sir.

Q. And did they give you some brochures with reference to their towers, that is, the Dresser towers?

[12] A. Yes, they gave us—we called them propaganda sheets, is what they put out.

The Court: While you're digging that out, this might be a good time to take our recess, because we only have a couple minutes before twelve.

I would remind the jury again, as I will at every time we break or recess or for the day, that you should be very careful not to discuss the case among yourselves in the jury room or any of the testimony, or with anybody else. Also, keep an open mind in this case throughout the trial until the same has been submitted to you.

Court will be in recess until 1:30 this afternoon.

(Court was then in recess until 1:30 o'clock P.M. on said day, at which time the trial proceeded in the presence of the jury, as follows:)

(Leo Heisel recalled to the witness stand)

The Court: You may proceed, Mr. Evans.

Mr. Evans: Thank you.

Direct Examination By Mr. Evans (continued)

Q. Just before the lunch recess, I was asking you about

whether someone came out from Dresser, and I'll just abbreviate the use of the word "Dresser", rather than the Dresser, Incorporated, or Dresser Company, and so on; you understand who I'm referring to? A. Yes, sir.

[13] Q. And when I speak about Community Television Services, Inc., I'll just use the word "Community", if that's all right with you. A. Yes, sir.

Q. I believe you told me that there was some gentlemen that came out at about the time or just before the time that you decided to erect a 2,000-foot television tower, is that right? A. Yes.

Q. And that man's name was Mr. McKinney?

A. Bob McKinney.

Q. And with reference to the information that you supplied to Mr. McKinney, what information did you give him, or what information did he ask for? A. We told him we wanted to construct a 2,000-foot tower, and we gave him the type of antenna, the transmission lines, microwave reflectors, and FM antennas that the tower would have to carry.

Q. And was there also a discussion of the height?

A. Yes, it had to be 1,984 feet, overall.

Q. And when you say "overall", what do you refer to?

A. That includes the top beacon and lightning arrester on top of the antenna.

Q. That includes the tower, plus the antenna, plus the beacon and the lightning arrester? [14] A. Yes, sir.

Q. And then after you gave him that information, what occurred next? A. Well, Dresser had come in, and I gave the same information to Stainless and also to Kline.

Q. Now, Stainless was another manufacturer of towers?

A. Yes, sir.

Q. And Kline was also the manufacturer of these towers? A. That's right.

Q. All right. And then who prepared the specifications with reference to the tower? A. The tower itself specifications was prepared by the manufacturers.

Q. Who prepared the references to the wind, this 60 pounds per square foot? A. They did, the manufacturers did.

Q. I believe I asked you also if they gave you certain literature just before lunch, and you said they did?

A. Yes, they did.

Q. And when I say "they", I'm referring to Dresser?

A. That's right.

Deputy Clerk of the Court: Plaintiff's Exhibit 1 and Plaintiff's Exhibit 2.

Q. I'll ask you who gave you Exhibits 1 and 2?

A. They would have been given to me by Mr. McKinney from [15] Dresser.

Q. And was that prior to the time that you bought the first tower from Dresser? A. That's right.

Q. And did you look over Exhibit number 1 and Exhibit number 2, Mr. Heisel? A. Yes, I did.

Q. I notice in Exhibit number 1 that there is on the last page, being page 15, it says in bold print at the top: Wind and Ice Loads; did you notice that table? A. Yes, I did.

Q. And in this table on page 15 of Exhibit 1, does it set the wind velocity in miles an hour with respect to the amount of wind pressure that it will exert on an area of one square foot? A. Yes, it does.

Q. And as I understand it, you had nothing to do with the preparation of page 15 of this Exhibit 1? A. No, sir.

Q. And you had nothing to do—and when I say "you", I'm speaking about Community Television—with the preparation of Plaintiff's Exhibit 1? A. No.

Q. And with reference to Plaintiff's Exhibit 1, I notice on page 1 it shows a photograph, and it says in part: [16] "Dresser towers have been in service since the very first days of television. In the winter, loaded with ice and hammered repeatedly with gale force winds, these towers absorb some of the roughest punishment that towers take anywhere in the country—yet continue to give dependable, uninterrupted service."

Did you notice that in that exhibit when you were negotiating? A. Yes, sir.

Q. Did you rely upon it?

Mr. Doyle: Just a minute, now. If the Court please, I think there's insufficient foundation at this time for that statement. Furthermore, the document speaks for itself, and not material to the issues in this case.

The Court: Overruled. The answer, then, may stand.

Reporter: I didn't have an answer.

The Court: Oh; I thought he said yes.

Q. What was your answer; did you rely upon it?

A. Yes, sir.

Mr. Evans: Now, without going into the further things that are contained in Exhibit 1, we'll offer in evidence Exhibit 1, and you have a photocopy of it, counsel, do you not?

Mr. Doyle: Yes. If I can just take a quick look at it.

[17] Q. We have a question about one loose page. I'll hand you Exhibit 1, and also I'll hand you this page here (indicating), which was in Exhibit 1, and I'll ask you

if you know whether that's a part of Exhibit 1 as you received it from Mr. McKinney? A. I don't know, because there were some loose sheets, too, in the file, and I couldn't recall if that was part of it or not.

Q. I see. But as to Exhibit 1 as it is bound, that's the way you received it? A. Right.

Q. You know that? A. That's right.

The Court: Do I understand, then, you're not offering—

Mr. Evans: I'm not offering Exhibit 1 until I lay further foundation. Mr. McKinney is listed as a witness, and we can find out from him.

The Court: Very well.

Mr. Evans: Does the Court want to look at the exhibit?

The Court: Well now, wait. Are you offering Exhibit 1 minus the sheet?

Mr. Evans: Yes, I'm offering Exhibit 1.

The Court: Yes. Is there objection?

[18] Mr. Doyle: Yes, we'll object on the basis that it's not material to any of the issues in the case.

The Court: Let me see the exhibit. Has it been established what Mr. McKinney's title was, or what his connection was with Dresser?

Mr. Evans: He's the man that signed the contract, as we get into it, Your Honor, and he's also listed as a witness.

Mr. Doyle: If the Court please, could we approach the Bench for just a minute?

The Court: Yes, sir. Do you want Bob up here?

Mr. Doyle: No, not for now.

The Court: Okay.

(Respective counsel then approached the Bench, but no record was made at the Bench conference, and following

the Bench conference the trial proceeded in the presence of the jury, as follows:)

The Court: Had you completed your objection?

Mr. Doyle: Yes, Your Honor.

The Court: The objection is overruled. Exhibit 1 will be received in evidence.

Q. Hand you what the Reporter or Clerk has marked as Plaintiff's Exhibit 2, and I'll ask you to look at that and tell me if you received that from Mr. McKinney when he was out here on behalf of the Dresser company? [19]

A. Yes, I did.

Q. And was that before the first contract was negotiated for the tall tower? A. Yes, it was.

Mr. Evans: We'll offer in evidence Exhibit number 2.

The Court: Have they seen it?

Mr. Evans: They have a photocopy.

The Court: I know, but they have a right, if they wish, to make an objection.

Mr. Evans: Yes.

Mr. Doyle: If the Court please, we have no objection to the admissibility of Exhibit number 2, as it's our understanding that this material is only preliminary, and that in accordance with our discussion with the Court, at least at this point, we do not object to the exhibit, as such, if it's only preliminary.

The Court: Well, I don't know whether Mr. Evans is going to concede that it's only preliminary.

Mr. Evans: Well, I think it's part of the plaintiff's case, Your Honor, as I put the pieces together.

The Court: Well, I guess I better take a look at it if I'm going to have to rule on it. I might just add that I don't regard Exhibits 1 or 2, either one of them, as being part of

the contract, and if there's a later contract that's to be introduced, that would supersede [20] the brochures, but Exhibit 2 will be—the objection to Exhibit 2 is overruled, and it may be received in evidence.

Direct Examination of James Trotter by Mr. Smith
Trial transcript at 883

Q. Sure. Mr. Trotter, I gather that you participate in work leading up to—or efforts, at least, leading up to the sale of various Kline towers, do you not? A. Yes, I do.

Q. And as to this particular tower, you said you were asked to bid; was that on certain specifications that you were asked to bid on? A. Yes, it was.

Q. And one of those specifications was that the tower have a 60-pound per square foot wind load on the flats, is that correct? A. That is correct.

The Court: Did you say 50 or 60?

Mr. Cunningham: If I said 50, I apologize; I meant 60.

The Court: Well, I may have heard it wrong, too, but anyway, it's 60?

A. I understood 60.

Q. And that was a design characteristic upon which you were [884] making a bid? A. Yes, it was.

Q. You could, for example, have bid for a tower that would have had a 60 or a 100 or any other pound per square foot characteristic? A. Yes, we could have.

Q. But that's not what you were asked to bid on, was it? A. That is correct.

Q. And you didn't try to bid on a tower that would have an 80 or a 100-pound per square foot wind load?

A. No, sir, we did not.

Q. Now, the 60-pound per squarefoot wind load, was that set by the Community Television Services? A. In this case, someone there at the station, yes.

Q. Okay. And when you make a bid, do you do it—

when figuring your price and everything, do you take into consideration all the terms and conditions under which you agree to build the tower? A. Under which we agree to build, yes.

Q. And if you change those terms and conditions, you may want to change the price that you're willing to quote for a bid, right? A. Yes.

Q. Now, in this particular case in 1975, you did have certain terms and conditions on which you made your bid, [885] did you not? A. Yes, we did.

Q. Now, you were asked to look at Exhibit 64, and you said that there was a contract there. Actually, it isn't the full contract, is it? A. You said it was not a contract?

Q. No, I said it was not the full contract, was it?

A. I believe it was, sir. I believe the full contract was in that group of papers.

Q. You didn't see the terms and conditions in it, did you? A. I only looked at the front side.

Q. You said you only looked at the front side in looking at it, but actually, with your—what is marked proposal number 416-T-75, dated May 7th, 1975, would that be the contract you're talking about? A. Yes, sir.

Q. Now, the terms and conditions that we have reference to would be on the back side of the pages?

A. Of each sheet, yes, sir.

Q. And those are important to you as a tower manufacturer in determining the price and the conditions under which you would build? A. Yes, sir.

Q. And you specifically note that by saying on the bottom of each of the pages: All agreements are subject

to the [886] terms and conditions printed on the reverse side; is that correct? A. Yes, sir.

Q. Now, unfortunately, we only have a photocopy, and that doesn't contain the terms and conditions on the back side that you say are important, is that correct?

A. Not on the first sheet, no.

Q. The second sheet? A. No, sir.

Q. The third sheet? A. No, sir.

Q. Fourth sheet? A. No, sir.

Q. Fifth sheet? A. No, sir.

Q. Sixth sheet? A. No, sir.

Q. Seventh sheet? A. It isn't there, either.

Q. But those are a part of the contract, aren't they?

A. Yes, sir.

Q. And you wouldn't enter into a contract without terms and conditions, would you? A. No, sir, we would not.

Q. In fact, you wouldn't have built that tower out there [887] without the terms and conditions, would you? A. No, sir, we would not.

Q. Do you have a copy of the contract, the complete contract with the terms and conditions? A. With me, no, sir. I assume those gentlemen would (indicating).

Mr. Cunningham: Counsel, I wonder if you'd provide us with the complete contract.

Mr. Smith: I'm not sure that I've been provided with anything more than—I'll search for it, Alan, but I'm not sure that I was given any more than that by Kline.

Argument on Dresser's Motion for Directed Verdict
Trial Transcript at 1198

The Court: All right. I guess it's up to you, Mr. Cunningham or Mr. Doyle, whichever one wishes to go forth with the motions.

Mr. Cunningham: May it please the Court; at the close of plaintiff's case, the defendant moves the Court for a directed verdict, or in the alternative for a [1199] judgment of dismissal on each of the Counts of the plaintiff's Complaint, for the following reasons, among others:—

The Court: (To Deputy Clerk of the Court) Will you give me the file, please, Margaret. Go ahead.

Mr. Cunningham: As to Count One, plaintiff has failed to establish any negligence, any lack of ordinary care, on the part of the defendant.

Two, the plaintiff has failed to establish any direct cause between any claimed negligence and any damages alleged to have been sustained.

Three, that by the terms of the contract upon which the plaintiff places its reliance, namely, the one of July, 1968, and signed by the plaintiff bearing the date of August 5th, 1968, any liability in negligence has been expressly waived, and that the damages to be assessed, if any, are as set forth in the contract.

Four, that the plaintiff failed to commence his lawsuit within the time required by the terms of the contract.

The Court: Are you referring now to the 60-day period?

Mr. Cunningham: No, the six-month period, Your Honor.

The Court: Or the six-month period. Now, I just [1200] want to be sure now. The tower did not go down within the six-months period you're talking about?

Mr. Cunningham: It is our contention that the tower, one, did not go down within the six-month period, and even if the Court were to construe the six-month period as only starting from the time of collapse, it still would not have come within that six-month period, because it was beyond that six-month period. As shown by the Court's file, the collapse had occurred on January 11th, 1975, and the Complaint not having been dated until August 19th, 1975.

Five, that the evidence has clearly established that industry standards were followed, and that there is therefore no basis for a claim on negligence.

Six, that the evidence has established that the claims upon which the plaintiff is seeking recovery were beyond the state of the art, and that accordingly, there is no basis for liability in this instance on the part of the defendant towards the plaintiff.

Seven, it appears without dispute from the evidence that this was an Act of God, and therefore, there is and can be no liability, the evidence having established without contradiction that it was the Storm of the Century, and not merely a severe blizzard.

As to Count number Two,—

[1201] The Court: Now, maybe some of these points can be just referred to—

Mr. Cunningham: I thought I would try to do that, Your Honor.

The Court: Fine; thank you.

Mr. Cunningham: As to Count Two, which is titled Strict Liability, I would repeat what I have said as to Count number One, and if I may shorten it, I would do so as to each of the remaining Counts, and therefore not repeat them verbatim, but would add to it that there has

been shown no defect to have been in existence at the time that the tower left the control of the defendant; that there has been no showing of any unreasonable harm that would result therefrom; that in addition thereto, as to the tower itself, there would be no basis for liability on a strict liability theory, even absent the contract terms which I referred to earlier, on the grounds that the strict liability as to property damage should not apply to the product itself, but only to property damage as to other aspects.

And I think in that regard, the Court has suggested that there may be a difference between that which would be under the terms of the contract, namely, the manufacture of the tower, the erection thereof, and the other erection work done, as opposed, possibly, to I believe [1202] such things as for example the antenna and the building. But I would say that as to what had been contracted for by the parties, namely, the plaintiff and defendant in this case, would not fall within the terms of strict liability, whereas conceivably the building damage and the antenna might be treated separately from that aspect.

The Court: Are you arguing that there should not be—that 402A does not include property as far as the strict liability is concerned?

Mr. Cunningham: I believe that there are cases that say that it should not apply to property of any kind. I'm distinguishing in that regard, Your Honor, between types of property, property damage beyond that which was contracted for. That which was contracted for, namely, the property of the defendant that had been transferred by

sale to the plaintiff, falls into one category, and is not subject to strict liability, whereas property other than the subject matter of the contract may fit into a different category, and in that regard, there are some states that do allow recovery of property damage under strict liability. There are some that have indicated that that is not a proper measure of recovery.

The Court: I'm sure you've read the Sweetman Construction Company case v. Dakota Pump.

Mr. Cunningham: Yes, Your Honor.

[1203] The Court: Yeah, which doesn't exactly tell us, but—

Mr. Cunningham: That was the way I read it, too.

The Court: Yeah. I think it's some help, but it doesn't really tell us right out, and it refers to the cases that go the other way, too, right.

Mr. Cunningham: Right.

The Court: I think I understand. In other words, you're making a distinction between the tower itself, and really, the consequential damage of the antenna collapse as well as the two buildings.

Mr. Cunningham: Yes, Your Honor. As the Court has already pointed out at an earlier stage, I think there is a distinction between those two, and in particular as to the strict liability area, this distinction must be drawn, and then insofar as the law of South Dakota may be construed as to not permit a property damage recovery for other property, I would also add that as an additional bases for denial of recovery in this instance.

In addition thereto, I again want to call attention to the fact that since this is a commercial dealing between par-

ties, and there was contractual relationship, that the case law indicates that strict liability may not and should not appropriately apply to such a commercial transaction. This is augmented also by the terms [1204] of the contract, and therefore would tie into that aspect that I referred to under Count number One, but that it's also true independent of a specific term in the contract.

The Court: In other words, it's a commercial transaction as distinguished from a consumer?

Mr. Cunningham: Yes, Your Honor.

The Court: Although 402A does use the word "user" as well as "consumer".

Mr. Cunningham: I understand that, but we do have a strictly commercial transaction, and in addition to that, we have superimposed on it, limitations within the contract itself.

The Court: I'm nodding my head. I don't necessarily mean to say I agree with you. I'm merely saying I recognize your objections.

Mr. Cunningham: I understand, Your Honor. I didn't think that you were—

The Court: Necessarily agreeing with you on everything.

Mr. Cunningham: Correct.

The Court: Okay.

Mr. Cunningham: As to Count number Three, Express Warranties, the testimony was clear that the only express warranty that is claimed is 60 pounds per square foot on flats, and the testimony of the plaintiff's expert, C. M. [1205] Hardy, and I believe that of the others with Haag Engineering, supported without dispute the fact that they

concluded that the tower, had they made the examination, would comply with that, and therefore, there can be no violation of any express warranty that has been claimed, the only express warranty that has been claimed to have been breached. Accordingly, we would make the same motion as under the prior two Counts, and add thereto that there has been, one, no showing of any breach of any express warranty; there has been no showing of any direct causal relationship between any alleged breach of any warranty; and I should point out that there has been no claim that notice of any breach of any express warranty was given within the time period.

The Court: Yeah. You're saying that there was a phone call, but that there's apparently nothing in the evidence to indicate that the phone call said, well now, you've breached your warranty of not having 60 pounds per square foot on flat surfaces.

Mr. Cunningham: I found myself doing just what the Court was doing. I started shaking one way and then nodding the other. Yes, Your Honor, it is our position that that was not a notice of a breach of warranty. It was only the notice of a collapse having occurred.

The Court: Yes.

[1206] Mr. Cunningham: I would also point out that the express warranties are limited and confined as per the other—

The Court: Disclaimer provision in the contract.

Mr. Cunningham: And the other points that I made under the Count number One motion.

As to Count number Four, entitled Implied Warranties, the defendant would move for a directed verdict or judgment of dismissal on the bases as follows: That there

has been no showing of any breach of any implied warranty; there has been no showing of any direct causal relationship between any alleged breach of any implied warranty and any damaged alleged to have been sustained; that there has been an agreement whereby the implied warranties of fitness and merchantability have been expressly excluded under terms that comply with and are strictly in accordance with the provisions of the UCC, as adopted in the State of South Dakota, and that therefore there are no implied warranties by the commercial agreement of the parties to this contract. Further, that if there were any implied warranties that would form a basis for any causes of action, they would be strictly limited to the measure of recovery as set forth in the terms of the contract agreed upon by the parties.

I believe those are the bases upon which our motion [1207] is made at this time.

The Court: Very well. Mr. Evans?

Mr. Doyle: Just one second.

The Court: Yes, sir. Did you have something else you wanted to—

Mr. Cunningham: Yes, Your Honor, Mr. Doyle has properly called my attention to the fact that I may not have particularized the aspect that would apply as to all four of the Counts, and I should point out and urge as a basis for our directed verdict or in the alternative, judgment of dismissal, the fact that the plaintiff did not present a written claim within the six-month period set forth in paragraph 9 of the terms and conditions of the written agreement, which requires that the buyer, namely, the plaintiff in this case, submits a claim in writing to the seller immediately upon its discovery, and in any event,

within six months; and that that has not been done in this case, whether that be considered from time of shipment or acceptance, or even from time of collapse.

The Court: All right. Just to refresh my memory, I guess the Uniform Commercial Code has something to say about that, but does the contract specifically state that the notice must be in writing and a claim—is that paragraph 9? I'm looking at the fine print, and I [1208] don't know whether my glasses are good enough to see it all, but—

Mr. Cunningham: Your Honor, the terms of the contract—and I'm only going to read that portion of warranty and limitation of liability which you have requested—it says that—

The Court: Yeah; provided buyer submits a claim in writing; I see it now.

Mr. Cunningham: Right.

The Court: I see it.

Mr. Cunningham: I think that's the second sentence.

The Court: Right; the second sentence of paragraph 9.

Mr. Cunningham: Yes.

The Court: On the second page, and really, the paragraph immediately above Community Television's signature.

Mr. Cunningham: Immediately above the signature of the plaintiff.

The Court: Yes; all right. I guess I'll listen to either Mr. Smith or Mr. Evans.

Mr. Smith: May it please the Court.

The Court: I might say I have got a luncheon engagement at about twelve o'clock.

Mr. Smith: Why don't we let this go and come back.

[1209] The Court: Yeah, I'm thinking we might do that, come back at 1:30, and we could let the jury—well, the jury would just have to wait, I guess, and I think we should argue it maybe at 1:30. That might be a better way for you to get your ducks in a row, too.

Mr. Smith: Sure.

The Court: Let me just say in the few minutes that are before twelve that what I would like to hear from you most of all—and I don't mean to say by this that I've made up my mind before I've heard any argument, but that on Count Three as to the express warranty, it is my understanding of the recollection of the evidence that your own witnesses conceded, apparently,—and I've got to view it in the light most favorable to you, of course, when I'm ruling; in other words, it's in favor of the person against whom the motion is directed. There isn't any real issue, is there,—has anybody testified that this wasn't constructed so as to withstand 60 pounds per square foot on the flat surfaces?

Mr. Evans: Well, yes, Your Honor. The testimony shows that 60 pounds per square foot computed into wind velocity—

The Court: Is 120 miles an hour.

Mr. Evans: A hundred and twenty to 150 miles an hour.

[1210] The Court: Yeah. Then there are two things: First of all, there wasn't such a wind.

Mr. Evans: That's right. And therefore, it did not meet that 60 pounds per square foot.

The Court: Well, that's on the assumption that the wind blowing against those surfaces caused it to come down. Now, did anybody ever testify that that was true? Because he's also included the question of causation,

causal relationship. Now, your witnesses did testify that it was the—

Mr. Evans: The wind.

The Court: Well, the wind working on the guy wires, not working on the flat surfaces.

Mr. Evans: Well, I don't know as you could say the flat surfaces, because it works on the—

The Court: Well, that's what it says in the warranties, 60 pounds per square foot on the flat surfaces.

Mr. Evans: Well, but it works on the entire tower, the entire face of the tower.

The Court: Well, you know what I've got in mind.

Mr. Evans: Yes, I do.

The Court: And what I want to hear about.

Mr. Evans: As I say, and of course there has been interjected throughout, the question of ice.

The Court: Yeah.

[1211] Mr. Evans: And we have refuted that up to the best of our ability up to this point, at least, on the ice, so if you have no ice, and if you have the tower, and if you have a wind of 60 or 70 or 80 miles an hour, and it's supposed to take 120 to 150 miles an hour wind, then that explains it.

The Court: Okay. Court will be in recess until 1:30 this afternoon.

(Court was then in recess until 1:30 o'clock P.M. on said day, at which time the Court and respective counsel convened in the Courtroom, and the following proceedings were had, without the presence of the jury:)

The Court: Well, Mr. Smith, I guess I'll hear from you.

Mr. Smith: May it please the Court; I'd like to respond to the arguments of counsel for the defendant, and not

strictly in the same outline, because much of what we say cuts across all of these Counts, so I'm going to try to get right into the heart of things.

First, I'd like to settle this: Section 402A of the Restatement definitely refers to property damage. There's no question about that.

The Court: Even our South Dakota Supreme Court cites it.

Mr. Smith: Yes.

[1212] The Court: Right.

Mr. Smith: In the *Engberg* decision, Section 402A is cited, and the Court says, in the column right across from the citing of it: We hereby adopt strict liability as expressed in 402A.

The Court: Right.

Mr. Smith: Then we come to the question of damage to the very product itself, as distinguished from damage to some other property, and the cases which have—well, some of them began to establish what was picked up as Section 402A in the Restatement, and since then, are overwhelmingly to the effect that damage to the very product itself is within the ambit of Section 402A, and I think the *Sweetman* case gives an indication. It says: We assume, without deciding, that the doctrine of strict liability adopted by this Court in Engberg was correctly applied in this case; and this was a case that involved, among other things, damage to the product itself.

The jury decided for the defendant, so that's why they didn't have to decide anything there, but our Court at least did not rule it out. It would give some indication, I believe, of how the South Dakota Supreme Court would rule on that.

Then I'll refer to some principles of law here, which our research supports, and we have not completed a [1213] brief on all of this yet, but we certainly can.

The plaintiff is entitled to establish the existence of the defect and the defendant's responsibility therefor by circumstantial evidence and expert witnesses. We have cases to that effect. The doctrine applies to a product dangerously defective, even though it's not ultrahazardous, is the words of the statute—I mean the words of the Restatement are, to any product in a defective condition unreasonably dangerous.

The Court: However, the "unreasonably dangerous" is to the user or consumer or to his property.

Mr. Smith: Yes.

The Court: You're taking it that it's to his property that it's dangerous.

Mr. Smith: Yes. This is dangerous to his property when the very product sold collapsed.

The Court: Yes.

Mr. Smith: Likewise, authority that proximate cause may be established by circumstantial evidence. Also, authorities that where the defendant is strictly liable in tort, the fact that it restricted its contractual liability is immaterial.

Now we come to the tort matter; a manufacturer cannot limit by contract his tort liability for defects. This would be violative of public policy and void. That [1214] has been held in other cases. It was held in the pioneer case, the Hanningsen v. Bloomfield case that began all this business of strict liability; it was held in the *Haley* case that we can cite and will cite in a brief, and it is the holding of South Dakota statute, which we cited

in the brief that we have already submitted, SDCL 53-9-3, which provides that: All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud or willful injury to the person or property of another or from violation of law whether willful or negligent, are against the policy of the law. And in conjunction with that, we must consider 20-9-6, also cited in our first brief: Every person has, subject to the limitations provided by law, the right of protection from bodily harm or restraint, from personal insult, from defamation, and from injury to his personal relations, and every person is bound, without contract, to abstain from injuring any such rights of others and to abstain from injuring the person or property of another.

So we maintain that any attempt at disclaimer as to tort liability is against South Dakota public policy and void.

Then there are numerous cases holding that these attempted exculpatory clauses will not be upheld where [1215] the parties are not on an equal footing. Now, it is true that in strictly commercial cases, these have at times been upheld, but if you examine the cases, you will see that they are between what you might describe as corporate giants, like Delta Airlines v. Douglas Aircraft. The example closer to what we have here, we maintain, is the Arrow v. Fruehauf case that we cited. These were both companies, and the Court there said that Arrow may be expert in the field of transportation, but certainly not in the field of design and manufacture of trailers. We say that applies exactly to this case, where our people are experts in television transmission, but not in the design of the tower with which to perform that transmission.

Next, as to the attempted six-month limitation. First, one of the early sections of the Uniform Commercial Code on that, cited at page 4 of our brief; it's UCC 1-204(1): Whenever this Act requires an action to be taken within a reasonable time, any time which is not manifestly unreasonable may be fixed by agreement.

So we say that a six-month limitation is manifestly unreasonable, particularly where it isn't something you're going to discover, where it's latent.

Then tied in with that is a pair of South Dakota statutes, 57-8-61, headed Limitation of actions for [1216] breach of contract. It reads: An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it. So the six-month limitation in what we've referred to as the boilerplate of that contract will not stand, under the South Dakota statute.

The Court: And this was within a year?

Mr. Smith: Oh, yes.

The Court: Because it was from January to August, wasn't it?

Mr. Smith: Yes. Then we go to the next section which is of importance, SDCL 57-8-62: A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered. Again, we

refer to the 60 pounds per square foot express warranty which we would have no way of knowing whether it had been met or not until the tower failed.

[1217] The Court: Yeah. The thing that bothers me—and I guess Mr. Evans addressed it just before lunch—is, where is—I really don't see where there's any testimony on the part of your experts that there was any breach of a warranty as to the 60 pounds per square foot on flat surfaces.

Mr. Smith: That's one of the things, Your Honor, that is covered by the circumstantial evidence, or it may get into the field of res ipsa loquitur, the thing speaks for itself. They say, here's a tower that will withstand 60 pounds per square foot. The testimony is that there was no wind up there that would translate into 60 pounds per square foot. There was no ice. So we didn't have a load of 60 pounds per square foot or anything near it, yet the tower collapsed.

The Court: Yes. but every one of your experts indicated that the tower collapsed by reason of the so-called resonance.

Mr. Smith: Yes, sir.

The Court: And that went back to the question of the guy wires or the guy cables galloping.

Mr. Smith: Yes.

The Court: And that the galloping of the cables were what brought the structure down.

Mr. Smith: But it's a structure—I don't know [1218] whether the Court is making a distinction between the main mast—

The Court: Yes, I am.

Mr. Smith: I don't think you can. That tower is a—

The Court: Is more than just the mast.

Mr. Smith: Is more than just a mast; that mast will never stand without guys, so when we speak of "tower"—

The Court: We found that out when the airplane hit one—was it only one guy wire that it hit?

Mr. Smith: That's all it takes.

The Court: Just one guy wire.

Mr. Smith: Yeah. Or I think Professor Nelson just this morning said one member to take out—I don't know whether we've got it here—

The Court: Yeah; one member even of the mast would do it.

Mr. Smith: Yes.

The Court: Yeah.

Mr. Smith: You take out a diagonal strut at a crucial place, and you can weaken it and the thing can go, so we can't speak of just the mast as the tower. It's the tower, the guys, the anchors, the whole thing as a structure working together.

Now, I'll just touch on this lightly. I don't think [1219] there's any real issue been made of it, but when the typewritten portion of the contract says that it will be built to withstand 60 pounds per square foot on the flats, that is a technical specification. It constitutes a warranty, even though the word "warranty" or "guarantee" wasn't used right in that sentence. That's upheld by the authorities, and I think by the UCC itself.

The Court: Will you tell me again the statute that—because I don't have it in your brief, or I don't turn to it—that says that any clause with reference to the reasonableness of the notice as to the time must not exceed one year?

Mr. Smith: Oh.

The Court: Which section are we talking about?

Mr. Smith: This is—well, this is not notice; this is action.

The Court: All right; action.

Mr. Smith: Action; this is 57-8-61.

The Court: That's it; fine.

Mr. Smith: And 62, which follows.

The Court: Yeah.

Mr. Smith: Okay.

The Court: (Reading) By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

[1220] Mr. Smith: Yes, sir. All right. Next,—and this is in our brief at the bottom of page 8—Construction of words or conduct tending to negate or limit express warranty inoperative. And I think we've made that argument sufficiently in the written brief, that where they so specifically say in the typewritten part of the contract that it must withstand 60 pounds per square foot, then words that might purport to negate that, such as they refer to in their disclaimer, are, by the terms of the Uniform Commercial Code, inoperative.

The Court: Now, the Uniform Commercial Code was operative or effective as of July first, '67, was it? And this accident occurred—of course this contract is July 5th, '68.

Mr. Smith: It might have even been '66.

The Court: Well, no. I'm looking over at 57-8-64.

Mr. Smith: That's 1966. See, all of those which have parallel citations to—

The Court: I know, but I'm looking at 57-8-64, which says: Sections 57-8-61 to 57-8-63, inclusive, do not alter

the law on tolling of the statute of limitations nor do they apply to causes of action which have accrued before July first, 1967.

Mr. Smith: I see; you're correct.

The Court: So this would be operative.

Mr. Smith: Yes.

Mr. Cunningham: In any event, Judge, we are dealing with the UCC, because this is a contract of 1968.

The Court: Yeah; okay. That's clear, then.

Mr. Smith: Okay; we're all right on that one, then.

Then as to the implied warranty, the UCC provides that any modification or limitation of them must be conspicuous. That is SDCL 57-4-35. That's a conclusion for the Court to draw. I think we all—I think everyone in this case has had real difficulty reading that language, which is in gray fine print type, very close together, little white space around it. I venture to say that every one of us, in order to really analyze it, has had a girl in the office with the best eyes retype it double-spaced so you can study it. I believe the Court commented just this morning that it was hard to pick out of there. So we leave that to the Court, but we feel that certainly this is not conspicuous, and even the part at the end of paragraph 9, where they capitalize—

The Court: They still refer back to the fine type.

Mr. Smith: They sure do, yeah. So then we go to what we covered on page 12 of our brief, which is: Where circumstances cause an exclusive or limited remedy to [1222] fail of its essential purpose, remedy may be had as provided in this Title. That's 57-8-50.

The Court: Mm-hmm.

Mr. Smith: And here, they—in the first place, by a hard reading of their own terms, we might be out of Court,

anyway, because the tower did stand longer than six months after it was delivered to us, but we say that that, coupled with the fact that when the thing did collapse, Dresser was out of the tower business, effectively leaving us without a remedy except such as we've taken in this lawsuit.

And earlier, I think at the very beginning of this case, at the pretrial conference, counsel for the defendant referred to that limitation clause at that time as a matter of limitation of damages or fixing the measure of damages, and it is our position that that would violate the South Dakota statute on contracts fixing damages void. The exception is for liquidated damages.

The Court: Well now, wait. I thought that was void as to liability but not as to damages. Now, which section are you talking about?

Mr. Smith: Well, I'm referring to it now on the damages side, just to wind up this argument, because in the pretrial conference, if I understood Mr. Cunningham correctly, he was referring to these—what I've called [1223] exculpatory clauses—as fixing the measure of damages, meaning either of those three options which the defendant retained, which were to repair, replace, or refund an equitable portion of the purchase price, and at that time in the pretrial conference, I understood that he was referring to that as fixing the measure or the outer limits of any damages.

The Court: But the South Dakota statute precludes anybody from agreeing in advance as to liability as far as tort matters are concerned, does it not, but not as to damages?

Mr. Smith: Yes, as to damages. That's in our first brief.

The Court: Tell me what section that is.

Mr. Smith: Yes. I covered the first one you asked me about early in this argument.

The Court: Yeah.

Mr. Smith: The one I'm now referring to is SDCL 53-9-5.

The Court: Well, 53—

Mr. Smith: -9-5.

The Court: Yeah; that really relates to liquidated damages, right.

Mr. Smith: Yeah. Where that's usually applied is in damages for delay in a construction contract. And we [1224] know that if you state it as a penalty, it won't stand up. If you touch all the bases, you can get by in the right factual situation fixing liquidated damages, but that's set forth—the rules for that are set forth in Anderson v. Cactus Heights Country Club, found at the bottom of page 13 of our brief: If it appears that at the time the contract was made the damages in the event of a breach will be incapable or very difficult of accurate estimation,—I don't feel that we have that here. We can show what it cost us to replace the tower.

The Court: What page of your brief?

Mr. Smith: The bottom of page 12—or the bottom of page 13, carrying over onto the last page.

The Court: Mm-hmm.

Mr. Smith: But what the Anderson v. Cactus Heights case says is that the damages at the time the contract is made, you agree that the damages in the event of a breach will be incapable or very difficult of accurate estimation, then there must be a showing that there was a reasonable endeavor by the parties to fix fair compensation, and that the amount stipulated bears a reasonable relation to probable damages and not disproportionate to any damages reasonably to be anticipated.

The Court: Yeah, but don't you think 53-9-5 did really—the purpose was, if you can't agree in advance [1225] as to the exact amount,—it doesn't use the words "exact amount", but as to the amount, and they're not saying the amount here in their contract or their disclaimer; they're just saying that the damages shall be under a certain schedule, really, rather than an amount.

Mr. Smith: Well, whether you approach it from the standpoint of amount or the theory on which you do it, they have stated those three things, and they retain the sole option to decide which: Repair—they couldn't do that; they were out of the business; replace,—the same thing; refund an equitable portion of the purchase price.

We tried to cite all of the statutes which have application or which might have application, and we feel that that, coupled with the earlier one that declares it's against public policy to exculpate one in advance from negligence, rules out what they're trying to do there.

The Court: Thank you. Do you want a few minutes of rebuttal before we call the jury back in?

Mr. Cunningham: I'd like to address a few of the points, and I think Mr. Doyle does, too, Your Honor.

The Court: All right.

Mr. Cunningham: I'd like to point out very frankly that—and I'm not going to try to cover all the points, but the one-year statute of limitations is not what we're [1226] talking about. We're talking about a limitation, not of action, but a limitation of presenting written notice of claim, and that is not barred by 57-8-61. We're talking

about two different breeds of cats. We heard this morning apples and oranges, and in this case there's a substantial difference, and a substantial reason for a difference.

The suggestion was made that you can't limit the tort liability by contract, and citing the *Bloomfield* case. I should point out that the Bloomfield case is a typical example of a consumer product situation, and not what we're dealing with here, and I call the Court's attention to such cases as Moreira Construction Company v. Moretrench Corporation, in which the Court said that—and they weren't dealing with corporate giants, equal on each side, as the suggestion made by Mr. Smith. In asserting that there is a perfectly proper basis for using a contract of limitation in a commercial setting, limiting the type of damages that may be recoverable, the Court said: Unlike *Henningsen,* which dealt with a manufacturer and an ordinary layman, the instant matter deals with two corporations in a commercial setting. Exactly what we have here. Although plaintiff Moreira is obviously a small corporation, its owner has been engaged in the construction business for 18 years. So here we have [1227] KELO that has been engaged in business at least back to 1935, because Mr. Les Froke testified that he came with them as an existing company at that time. We're in a commercial, not a consumer product situation.

The South Dakota statute so frequently cited by plaintiff, which is I believe 53-9-3, saying that it's illegal to limit or confine liability, it just so happens that the South Dakota Supreme Court disagrees with their interpretation of the statute, because in Meuer v. Chicago-Milwaukee, 59 N.W. 945,—

The Court: That's a pretty old case.

Mr. Cunningham: It may be a pretty old case, but it has never been overruled or changed.

The Court: 1894.

Mr. Cunningham: And it happens to be directly on point and involved the statute. I think in this instance it may have the benefit of being not as old as the statute itself, and therefore an interpretation of the statute, and a controlling interpretation of the statute. The Court said that there, a contract as to liability for personal injuries could be entered into, and that was in spite of 53-9-3, and that determination was expressly acknowledged in a little bit more recent case of Keairnes v. Chicago-Milwaukee, in 171 N.W. 86, which is a 1919 case, Your Honor.

[1228] I believe that under the circumstances that we have here, we have a perfectly valid contract. We have a situation where the one claim for an express warranty, the witnesses have agreed we have complied with it, and there has been no testimony that we have not complied with it; and in any event, compliance or not, there is no direct causal relationship. They're trying this case on an entirely different theory, that is, that there was a galloping or a resonance, regardless of the strength of wind, and regardless of whether or not that did in fact occur.

Mr. Doyle: Just a comment or two, Your Honor. With respect to the statute that we've talked about here, 53-9-3, I think it's clear from a reading of the statute that it does not pertain to a situation where you have negligence without a violation of the law, because it says: Or from violation of law whether willful or negligent, are against the policy of the law.

Now, incidentally, the cases that Mr. Cunningham re-

ferred to are cases involving common carriers, and if you examine the cases in general, the Courts are much more reluctant to allow contracting away negligence when they're dealing with a common carrier. The law that is set forth in those cases, by the way, is the general law.

The Court: When you talk about violation of the law, [1229] it's in the alternative: "or from". Remember the way the statute reads: All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud or willful injury to the person or property of another or from violation of law; there's an "or" in there.

Mr. Doyle: Yes, or from violation of law whether willful or negligent. In other words, "or from violation of law whether willfull or negligent", are against public policy. We contend, of course, there's been no evidence here that we violated the law.

The Court: No.

Mr. Doyle: Now incidentally, that's the general law in the country, and we'll submit a brief to the Court on this proposition, but it's cited generally in 67 Am.Jur. 2d, Negligence, at Sections 20 and 23; and there are several Eighth Circuit cases on that particular point, too.

The Court: Okay. Well, I guess I'm probably going to take the easy way out. Go ahead. Don't talk too much that you may change my mind.

Mr. Smith: No, I just want to answer that violation of law thing. It's easy to say that that means violation of some particular statute, such as a—

The Court: Safety statute.

[1230] Mr. Smith: —safety statute or traffic statute.

The Court: Yeah.

Mr. Smith: That isn't necessarily the interpretation of it, because that's why we cited right following 53-9-3, on page 3 of our brief, SDCL 20-9-6: Every person is bound, without contract, to abstain from injuring the rights of any others, including property. So if I, through negligence, damage Mr. Doyle's property, I have violated the law. Now, true, it may be in a tort setting rather than in a criminal setting, but I have violated the law, and that's what this statute says: Violation of law whether willful or negligent, are against the policy of the law.

Mr. Doyle: That isn't what our cases say.

The Court: Okay. Well, anyway, I'm going to resolve it this way: First of all, let's start with the premise that I've got to view everything, as far as the evidence is concerned, in the light most favorable to the party against whom the motions are directed.

I do not have very much trouble on Count One and Count Two, particularly in view of Section 53-9-3. I can't believe that a contractual provision of that sort can't deprive a person from liability for negligence or strict liability, apart from the waiver of warranties. Therefore, I certainly deny the motion for directed [1231] verdict as to Count One and as to Count Two.

Now as to Count Three and Count Four, since I've already denied the motion on Counts One and Counts Two, I see no reason—and since both sides seem to want to still submit extra additional briefs, I think the best way to handle this is to simply reserve my ruling on the motion as to Count Three and Count Four. I do express this so-called "gut" reaction, and from what I've read so far, that I'm inclined to think that the provision in the contract relating to what in effect would be a waiver, that the pur-

chaser of the tower may have signed as to claims for express or implied warranty may be good, but I'm going to reserve my ruling on that.

I also do all of this on the general admonition of the Eighth Circuit Court of Appeals on many many occasions, and that is, that granting directed verdicts is frowned upon. It's far better to let the case go to the jury and let the jury decide what the verdict is, and then if I'm wrong and I should have granted the motion, I can still set it aside, or the Court of Appeals can come back, and if I do set it aside, then they can reinstate the verdict if I'm wrong there, or vice versa. They will have some judgment, and they'll know at least what the verdict is.

So my ruling is that I deny the motion for directed [1232] verdict as to Count One and Count Two. I reserve the ruling as to Count Three and Count Four.

Mr. Cunningham: I assume, Your Honor, that within that ruling, you would consider it appropriate at a later time to renew motions, then?

The Court: Right. Actually, Rule 50(b) permits me to make a later determination of the legal question raised by the motion. Furthermore, even then, you'd still have, even after the entry of the jury verdict or judgment, you'd still have ten days within which to move to set the verdict aside, if there was a verdict against you, and have the matter reviewed again.

Mr. Cunningham: We certainly hope that won't be necessary, Your Honor.

The Court: Okay. So we might as well call the jury back in and proceed, then. I am aware of the fact, however, that the rest was still subject to the right of the plaintiff to call somebody from the Carlson Construction Company to substantiate the claims of the Carlsons.

(The jury was then recalled into the Courtroom, and the trial proceeded in the presence of the jury, as follows:)

Mr. Evans: May we approach the Bench?

The Court: All right. Do you want Bob Larson up here?

Mr. Evans: No.

[1233] (Respective counsel then approached the Bench, but no record was made at the Bench conference, and following the Bench conference, the trial proceeded in the presence of the jury, as follows:)

The Court: We've had some legal questions to resolve or attempt to resolve that has delayed your coming back in. Counsel have indicated at the Bench, for other reasons than those, that the plaintiff has rested on one side, and the defendant would now have the burden of coming forward, or the plaintiff putting in a short additional evidence with reference to one contract relating to the Carlson Construction Company, and then I'm also constrained to do this by virtue of the fact that I still hear reports that we have got a storm coming in. I don't suppose you'd be too unhappy if I would say that—and they have promised me that the evidence will be finished next week; if I'd let you all go at this time, would there be anybody that would really be unhappy or upset? Not seeing anybody raise their hand, I'm going to tell you this, then: That as far as the jury is concerned, we will—I've got some matters to handle in Chambers—as far as the jury is concerned, we are about to recess until 9:30 Monday morning. I'm sorry that I wasn't able to tell you that at noon so that you could even gotten more of a head start.

[1234] I understand, at least, though, that the storm that's coming in probably won't hit here until—or even hit the Mitchell area—and I guess there's some from Mitchell;

two from Mitchell, and one from Carthage, which is up in that area, and one from Springfield, and so I think if we quit at this time, you'll all be able to get home safely before anything happens.

The weatherman at least hints to us that the weekend may improve, and that Monday will be a little better, but I would still hope that maybe you'd feel you'd want to come in on Sunday night, those of you that are from further away, so that we can start promptly at 9:30 Monday morning. Hopefully, we will finish it.

Now, please remember over this weekend, it's particularly important that you remember my admonition about not discussing the case among yourselves or with others, your husbands, your wives, or anybody that might try to talk to you about the case.

We've not had very much publicity about it, but if there should be something in the newspaper or on the radio or TV, try to disregard it or pay no attention to it. Don't read beyond the headline. Since this is a media case, I hate to say it, but you can't always trust the media, and I'm not saying that. I am simply saying that when a newspaper or the radio or the television has [1235] a story about something, not only they may not have the whole story; they may have included matters that were never brought up in Court at all, such as how much the lawsuit was all about in the first place, something like that that they picked up someplace else. Obviously, what they print is not subject to the Rules of Evidence that we have here, that evidence must be submitted either by stipulation of counsel or by sworn testimony presented here in open Court, and that's not true of any news story that's put in the newspaper or on the radio or on TV.

And while it is perfectly proper and appropriate for you to be thinking about the case during this weekend, what you've heard so far, both the direct evidence and the cross examination, you should not make up your mind or rush to judgment as to what your verdict will be until you've heard all of the evidence, the argument of counsel, which will probably be helpful in your arriving at a verdict, or the instructions of the Court as to the law, nor have you yet had an opportunity to discuss the case with your fellow jurors, which you will have when the case is submitted to you.

With that admonition in mind, Court will be in recess until 9:30 Monday morning.

(Court was then in recess until December 13, 1976, [1236] commencing at 9:30 o'clock A.M., at which time the trial proceeded in the presence of the jury, as follows:)

The Court: Did you have—Mr. Evans, I realize that you had rested, but it was subject to the calling of somebody from Carlson Construction Company, was it?

Mr. Evans: They have that information, and they're working on it.

The Court: So it's unnecessary to do that?

Mr. Cunningham: I think that's still in a holding pattern. We have been presented with some material, and we're trying to see if we can work that out.

The Court: Very well. As I understand it, then, you're ready to proceed with your case at this time, Mr. Cunningham and Mr. Doyle?

Mr. Doyle: That's correct, Your Honor.

(Discussion between the Court and Deputy Clerk of the Court relative to marking of exhibits)

Mr. Doyle: The defendant calls Mr. John R. Murray.

Closing Argument of Community Television
Transcript at 1809

Mr. Evans: May it please the Court, and counsel. Ladies and gentlemen: I'm sure that you're glad that we're this far along, and I'm sure that you are tired, shall we say; that applies to counsel, too, I might tell you.

Now, remember, this is a civil case, that is, this is not a criminal case. By that I mean in this case the burden is on the plaintiff to prove by a fair preponderance of the evidence, the greater weight of the evidence, the claims that it asserts against the defendant. And I think you should bear that in mind, as we say, because sometimes we get confused, but here we merely are required to prove, by a fair preponderance of the evidence, by the weight of the evidence, that the claims we [1810] make have been established.

It's the duty, of course, of counsel to help jurors, and that's what I want to try and do. I want to try and help you analyze and go through some of the evidence; and obviously, in the time that we have, we can't cover everything. And obviously, if we were to try to, why we've been here for about two and a half weeks, and to try and even summarize all of that evidence would take hours and hours, and therefore, what I shall try to do is just hit the high spots. And I'm sure that you would agree that you don't want to listen to counsel argue all day, and as I say, what we try to do is help you.

Now, we make three claims here, three different claims. We say, first, that the defendant, Dresser, was negligent; and then we say also that the defendant, Dresser, is liable under the theory of strict liability; and also, we say that Dresser breached the warranty that it gave to us. Those are our three claims.

And I want to say this, of course: When we're all through, the Court will tell us, and you particularly, what the law

is; and of course that is the law that will govern, and therefore, if at any time in my argument, I say something which is contrary to what the Court's instructions are, you realize you must disregard what I say.

[1811] And the other thing I want to say is that I'm not infallible. I don't have a perfect memory. And therefore, if I say some witness testified to something, and he or she did not so testify, then you take the witness' testimony, and disregard what I say.

With reference to infallibility, I'll tell you this: That almost 2,000 years ago, Jesus was born, and there was a perfect man. We've never had one since, even though we heard a man profess to be one. I think you follow me on that.

Now, the other thing I wanted to say was this: We start out—and I'll try to go through the sequence here with some exhibits. I'll just touch a few of these with you. You remember we passed this around, and this is the kind of a tower we're talking about (indicating). Now, this isn't a—shall I say a barn or a house, but it's a structure, and it's different, shall we say. And what brings it about is that you take Plaintiff's Exhibit 1—I think you've seen it—but in this exhibit, here is the defendant saying: In the winter, loaded with ice and hammered repeatedly with gale force winds, these towers absorb some of the roughest punishment that towers take anywhere in the country—yet continue to give dependable, uninterrupted service.

And then they go back on page 15 of this exhibit, [1812] and they give you wind and ice loads, and they show that the wind pressure of 60.5 pounds per square foot, that that's the equivalent of a wind velocity of 120 miles an hour.

And then of course also in Exhibit 2, you'll notice that it's not only just in the United States, but it's worldwide where they put these towers up, even in Africa, as you'll notice. And so we're not dealing here with an amateur that's trying to get started, shall we say.

Then the next thing is, of course, you're all familiar with the fact that we had a contract, erected a tower in 1966 and '67, and put it in operation, and we'll call that the first Dresser tower. Now, you will recall that unfortunately, an airplane hit one of the cables, the guys, and severed it, and the tower collapsed. And then following that, there was a replacement tower which was put up, and you'll recall that the replacment tower was a duplicate of the original, except we used some parts that could be used and were not damaged, in that second tower.

Then we go along, and we get down to the point of the testimony of these witnesses with reference to what occurred out there. Now first, I believe that there's no dispute that the tower collapsed. Nobody said anything to the contrary, although we had a lot of quarreling [1813] over how it collapsed, and so on, but it did collapse. And when it collapsed,—and the first man that saw the results was Mr. Les Froke. He tells you in the morning that he come out, that he looked at the tower, and section 25 was right in front of the door, and that section 25, you remember, was about 75—about 750 feet from the top of the tower. You can count that down; you remember they're 30-foot sections, and 30 feet times 25 would be 750 feet, and he told you that there was no ice at that point. He's the first man that saw it. And there's no dispute as to that. Nobody else has come in and said, oh, yes, there was; I saw it. Or anything like that.

Then the next event is that here the people go out to bring him in; he has no car. And you remember the testimony with respect to those people that went out there, and they say no, no ice. And they were around there, and this was within a matter of say eight hours after the tower went down, or about that; and you remember Scott Park; you remember I called him, and asked him; he was the driver of the car, as I remember, that went out to bring Mr. Froke back in. Nothing there.

Then the next interesting thing is that on the next morning, which was Sunday, there was a lot of people out there, and we brought into Court here the—first we [1814] brought in Ed Pesicka, I believe that was his name, the salvage man. And Hammod Moody Yesda, the Syrian, that came in, and he told you he looked all over, see, and of course he's a salvage man, and he—on one of the drawings, you remember, he drew; he was just all over. Well, he says there was no ice. And he's got no motive, you know, to come in here; he's not interested in the lawsuit; and neither is Ed Pesicka. They finally did buy the salvage for a dollar, but they had to do a lot of things, if you remember that contract I prepared. It says, not only you have to clean it all up, but you've got to hold us harmless if anybody is injured, and in return for that, you do it; you pick that cable up. And remember, he told us about the risk of cutting that zinc-covered cable up.

And then also you remember that there was Lee Heisel who was out there. He saw no ice, and as a matter of fact, you remember I had some of them even take this one drawing and sort of draw where they were looking for ice, and their paths, and so on, and they found no ice. Then you heard these other witnesses, and they say there was no ice.

I don't know how you can reconcile that, but I do say that I believe that a disinterested eyewitness who comes into Court and under oath, and who testifes that [1815] there was no ice, is ten times—yes, a hundred times stronger than somebody who comes in with an opinion with respect to clouds.

We all have opinions. Let me illustrate to you. A week ago, you remember the meteorologist was forecasting a storm. And we all were apprehensive, and we went home, but no storm. It was their honest opinion and judgment that we were going to have a storm, but we didn't have one. And I don't believe that if some meteorologists come in here and says, oh, yes, we did; oh, yes, we had an inch of ice, three inches of ice, or six inches of rime ice, that any of us would pay any attention, because why? We know differently.

Then we go to the next point, and that is that Mr. Kirkpatrick was hired to come up here, to make a search, and he told us that he had been instructed to look for ice. He's an engineer. He tells you how not only did he make a search of the area there, but he says that when he got out to the west anchor, he went down the railroad track. There's an aerial photograph here, I believe, that will probably show that. Yes; I believe—this is just one (indicating). I think you can see there's a railroad track along here; this is the north-south road (indicating). He comes from over at this west anchor here (indicating), and he comes down along the railroad, [1816] even, to see if there's any possible sign of ice. He doesn't find any.

His wife, you heard her testify, how she come up, and how she worked, and how she made her drawings out there in the snow, locating the different ends of cables, and taking

photographs, and things of that nature; and her husband also took photographs. And there's no quarrel about those photographs. There's no quarrel about her drawings. You remember my examination of Mr. Minasian, and he said no, he concurred in the photographs; he concurred in the drawings.

Then we go to the next proposition, and that is that we know the tower came down. I want to stop here for a moment and point out to you that it seems to me that we've got to take the wind velocity at 70 to 80 miles an hour in the upper reaches of the tower. There isn't any evidence to the contrary, and you remember we went into what they call the 850-millibar maps, and those 850-millibar weather maps show. Those are the things that pilots use. And there just wasn't any wind over 70 to 80 miles an hour on the top of that tower. Now, this was the defendant's expert witness, you remember.

So then we go to the next thing, and we say, well, the tower came down; and now, 70 to 80 miles an hour would only be a load of about 30 pounds per square foot [1817] on the flat suface of the tower, and so of course with the 120 miles an hour that we're talking about at 60 pounds per square foot, then immediately comes up the question, well, certainly there wasn't enough of a wind to reach that pressure that would be required to exceed 60 pounds per square foot. Then in order to overcome that, they come in and they tell us, and particularly Professor Orville says, oh, three inches, six inches, nine inches of rime ice. He says the weather conditions were ideal. And you recall our testimony was that—how many truckloads of ice that would be, and that isn't contradicted, you understand.

Then we also produced a pilot who flew that afternoon from Sioux Falls to Minneapolis, and he says, no ice. And their own expert, Mr. Sand, from Wyoming, a pilot, he told you that the best proof of whether there's ice in a cloud or clouds is, let the pilot fly through it; that's how you really determine it. There isn't any evidence here that there was any report by any pilot of any icing, and as I say to you, if there was icing, what happened to the phantom ice, as I call it?

Then they talked about snow, too, but there wasn't any snow that was attached to the tower. To begin with, you remember they were talking about this rime ice as sort of being like snow, and it would blow off; you [1818] remember that; that is, it would blow off from the tower just like snow. But finally, when we got down to it, we got down to the very proposition that rime ice is similar to that ice that you have on your refrigerator at home, and that anyone who has had to remove or deice a refrigerator knows that if you really have to dig it off from there, just what you're handling, the kind of ice you're handling. So I think that we can fairly say—and I don't believe that you could possibly say that there was any ice on that tower when it collapsed. There just isn't any evidence to support that claim. But the defendant has to make that claim in order to get away from this 60 pounds per square foot, because their own experts say that the wind was only 70 to 80 miles an hour, and at 70 to 80 miles an hour, that would only be exerting a pressure of about 30 pounds per square foot.

And then as I say, the other thing that's sort of been injected into it also was the condition of the tower. Well, you had first, I believe it was Glenn Johnson from Johnson

Tower Service came down, and he made his written report; it's in the record. I think it's Exhbit 27 or right in that range there, but you remember he testified to his inspection of the tower, and the guys, how he put a transit on it and looked up to see if it was true vertical, and the guys were okay. You read [1819] the report; it's a part of the written exhibits here. Nobody has questioned him about it. It's his written report.

And then the other thing that Paul Betzing was up on that tower, and as I remember, that was along perhaps in November, that he had to replace some little unit up in the antenna which was a deicer, part of the deicer. I can't tell you just exactly what it was, but he tells you that he then checked the tower, and the bolts and the other things, as he came down the tower, and I presume that—well, if he could find something, as we always say, that needed a little repair —it's like taking the automobile into the garage or into the filling station, even, and the fellow says, well, that flange out there, maybe you ought to put a new one on. Well, that man is in business, and he wants to make a little money; so do all of us. And so with Paul Betzing.

And then remember, here's Paul Betzing, who's an experienced man climbing these towers around this part of the country, and he tells you he knows what ice is, and Paul Betzing showed up there on the day following the storm, and he looks, and he didn't find any ice. So I think that we can pretty much eliminate that proposition. There isn't any evidence that there was any failure to maintain the tower. It was maintained, and [1820] I think that we'll have to say that that tower, just the moment before it fell, was in the same condition as it was in when it was received from Dresser. By that, I mean that Dresser sold and erected the

tower, and then they turned it over to us. There isn't any evidence that we made any changes, any alterations in the tower. It's just the same way that we received it when it went down.

And number two, I think that we will all have to agree that with respect to that tower, it was dangerous, unreasonably dangerous, to have a tower like that to come down under those circumstances out there, striking one building, demolishing the utility building, and you realize that under what we call strict liability, as the Court will tell you, even though Dresser used all of the care it could, nevertheless it's liable, under what we call strict liability, as the Court will explain to you.

And then the other thing that I wanted to say was that you heard Bob—or first you heard Ken Clark testify. Now, Ken Clark, of course, is a retired weather observer out here at the National Weather Service. He's lived here in this community; still lives here; worked for many years, he told you, even beginning in World War II, when he prepared the weather reports for the pilots taking off, and certainly he's far more familiar with the weather here than somebody from [1821] Chicago or somebody for Rapid City, because this man has devoted, you might say, most of his life to weather observations, weather forecasts, right here in Sioux Falls. And he told you that the conditions were not such as would produce ice.

Then I think we should go to the question of why the tower collapsed. Well, we know, first, I think we can rule out ice. We know, second, that the wind load was such that it was less than half of this 60 pounds per square feet. Then we know that Dr. Nelson came in here, who is the head of the Physics Department out at Augustana College, and he

tells us that that tower went into resonance. He explains to you what the galloping of the cables do, and now, he's a physicist; as I say, he's a doctor. You heard his qualifications, and he come in here, and he told you in his opinion what happened to that tower. And now, it's true that Mr. Minasian says, oh, no, it couldn't; but also, we had Mr. Hardy from down in Texas, and you remember Mr. Hardy told you it was the vibrations or the frequencies; and I'm not an engineer, you understand, so maybe I don't use the exact words, but he told you that this had happened in other towers, that is, this—as I call it, galloping; you and I can hear a horse galloping along the ground.

And then we've all seen, probably all of us, if you [1822] drive along the highway, and you look at those electric distribution wires; you know, they're attached to the pole. There'll probably be three of them, and you've all looked at those when the wind is blowing, and you see those wires flopping and up and down. Now, that's what I call galloping, but I think most of you have actually seen it. And I think also that everybody agrees that they have to put something on it to dampen it, to stop it, but there wasn't any testimony here that just by putting a—I think they call it a Stockbridge dampener, onto that guy, that it's going to stop it from moving up and down. It's going to—shall I say control it; it's going to reduce it. But there was some testimony, as I remember, about a frequency of two million. I don't know what that refers to, other than I presume it's the—it certainly can't be the up and down flopping of the cable, because you couldn't possibly see anything like this, if it was two million cycles; it's got to be something different than that.

So I think we come down to this proposition: Number one, you remember the testimony of Mr. Clark. Also, you remember the testimony of Bob Wittrock, and he's flown I think 10,000 hours, and you know, if you compute that out, that means he's spent over a year of his life in the air flying an airplane. And the way I computed [1823] that, I took 24 hours in a day and 365 days in a year, and I multiplied it out, and I found out that he spent more than a year of his life up there in an airplane.

And he told us, Mr. Clark did, that we have from two to three of these storms every year. Now, let's see what Dresser could have done. They could have obviosuly checked the National Weather Bureau to find out the kind of weather we have up in this country. Now, I think the testimony by Mr. Trotter was that Kline's have got a 2,000-foot tower down in Sioux City. I believe he also said they had a 2,000-foot tower down in Waterloo, Iowa. I say 2,000; maybe I should say tall towers. And I believe also he testified that they had one in North Dakota. And you'll recall that when the Community Television tower went down in this storm, nothing happened to the tower down in Sioux City, for instance, and I think it indicates that Dresser's were just negligent in failing to design a tower that would support the conditions out here that we have. And I think, furthermore, that they were negligent in failing to do that which Dr. Nelson says can be done, and that is to tie those guy cables together, so to speak, to prevent this galloping. He told you that, and I haven't heard anything to the contrary about that method. If there was testimony, of course you would recall it.

[1824] Then also, it seems to me that we ought to remember this: That Professor Emory Johnson testified; he's from South Dakota State University at Brookings.

That gentleman come in here, and he says he teaches design engineering, and he told you that it was basic, fundamental, a principle in design engineering to take into consideration ice and snow and wind. He told you that, and it isn't disputed. He came in here, and he's got no interest in the lawsuit, but he told you that he teaches his students. And then when you come down to it, you can say, well, he didn't design a tower. Well, he says, and his testimony was that it applies to any structure; any structure that an engineer is designing, whether it be a house or a barn or a windmill or a tower, it's a structure. It's something that is put together to extend upward and outward.

Now, it seems to me that we can draw these conclusions, if we can start out and say, well, there isn't any dispute about the tower collapse. And two, there isn't any dispute that if that tower was designed to support the 60 pounds per square foot of load, that it wouldn't have collapsed. Why? Well, there was only 70 to 80 miles an hour of wind up on the upper reaches of it, and of course down lower it was much less, as you remember, because your wind increases as you get up; the [1825] velocity of it does or the speed of it, whichever word is proper.

And then it seems to me that we have to take up the other propositions that have been raised. And they have told us, as I understand it, that—ice load? Well, I think we have disposed of that. The wind load, we know what that was.

And then we get into this proposition of—of course, Mr. Trotter, you remember, told us what the cost of the new tower was, and he says that the nine-foot tower would

have been $20,000 less than the new tower, and you heard the testimony with respect to the antenna.

It seems to me it's something like this: That if I build a house for $40,000 in 1968, and if through someone's negligence my house is burned down and I have to build a new house in 1975, and it costs me $65,000, I've been damaged in the amount of $65,000 less the depreciation, because my old house was—shall I say six years old or thereabouts; and the Court will cover that in his instructions to you.

And of course nobody has made any claim here about the antenna not being completely destroyed. You heard the testimony with respect to the cost of a new antenna. They just replaced the old antenna.

And then also, I was interested very much in the [1826] fact that they come in here, and they tell us that —well, Mr. Orville tells us about—he's a specialist in clouds. And the trouble of being a specialist is that you can have opinions, but your opinion is never any better than the reasons for it. And as I pointed out earlier, it was our pilot from out of Sioux Falls here, Bob Wittrock, who told you that afternoon he flew to Minneapolis, and there was absolutely no rime ice, no ice on that airplane. And you remember the testimony of Mr. Sand, who said, yes, it's the pilot who flies through the clouds that has the best knowledge of whether there's any moisture in it. And also, I was very much interested that here was a man with 10,000 hours, Mr. Wittrock, he's a pilot; he told you that getting down when the temperature is say 20 or a little bit below 20, why you just don't get any rime ice. You remember his testimony in that regard. I'll take the pilot who's had

this experience over the meteorologist who starts telling us in theory something about it.

Then they start telling us how small these supercooled particles were, and as I understand it, they're so small you can't see them with the human eye. You recall the testimony in that respect.

So when I say this to you, I say I'm trying to help you. I could go—well, let's just spend a couple of [1827] minutes on the tower proposition. I really don't care, you know, what section of that tower failed. I don't care whether it was section 11. They say that was the weakest section, as I remember. Well, if it was the weakest section, why didn't they make it just a little bit stronger for us?

Why would you make a—let me ask you this: Why did that leg three inches or three and a quarter inches in diameter up there at 11 fail, when down below, I think it was at section 15, a leg three inches in diameter didn't fail? It seems to me there's more load. Every section puts an additional load upon it. But I'm not concerned about that, except from an engineering standpoint, and from the standpoint of the next time you design one, you should take into consideration that that is the weakest part of the tower; then let them reinforce it.

But I am very much interested in the proposition that the tower failed. Now really, does it make too much difference whether it failed at section 11, section 24 and 25, or whether it failed at section 36 and 37; but the one thing which is interesting is that the only part of that tower, the only part of that tower that went to the west and to the north was a leg out of section 37; just blew out of there, and it was blown against [1828] the wind, so to speak, going against the wind.

The other interesting thing is that we've heard how this came down, and it hit guy number 7, and then it misses guy number 6; guy number 6 must have ducked out of the way, which is of course just—well, it's fantastic, and it comes on down. Well, as I say, I don't care what part failed. It did fail, and when it failed, it didn't have the load that it was supposed to support upon it, so what section failed, what difference does it make, except from an engineering standpoint. It doesn't make any difference. It failed, and it fell, and you saw the photographs of the remains, as I say. So I don't think that that's of any significance from the standpoint of the plaintiff in this lawsuit.

Next, there's been a lot of talk about the 60-pound wind loading. Well, it develops that RCA had to furnish the antenna. RCA wanted to tell Dresser the weight of the antenna and the wind loading, so they wrote a letter, and there was correspondence back and forth, but let me ask you this: What difference does it make who spelled out the 60-pound wind load, when it wouldn't support it. You see, you've got this situation: You've only got a wind load of about 30 pounds per square foot, so what difference does it make who proposed the 60 pounds? That is one of the other things that they rush up and [1829] throw at you and have you believe.

Now, as I say, there's this: I'm going to describe the two things that I think are outstanding: One is what I call the phantom snow, the phantom ice; it just wasn't there. You heard how many truckloads of ice there would have been if that tower had been loaded up with ice. Nobody refutes the computation that Mr. Kirkpatrick made for you. But where did it go, the phantom ice? There wasn't any ice

on that tower. They had to come up, though, with some attempted explanation, because why? They knew the tower went down. They knew there was no earthquake, and they knew that that tower was not subjected to a load of 60 pounds per square foot, which is the wind loading that it was designed for, and so they come up with what I call the phantom ice. Now, I don't think that any of you are going to buy this phantom ice, and as I say, I don't care how that tower came down. It doesn't seem to make any difference, does it, if one section failed or another section failed; it failed.

The Court: Mr. Evans,—

Mr. Evans: Yes, Your Honor.

The Court: I was going to suggest that you have used up 40 hours—or pardon me.

Mr. Evans: Forty hours?

The Court: Forty minutes of your one hour.

[1830] Mr. Evans: I wondered why you were getting so tired of me.

The Court: No, no, no, not at all. I just wanted to know if you want to save. I'm sure, some time for rebuttal.

Mr. Evans: Thank you, Your Honor.

The Court: And I'm just reminding you that you have used 40 minutes, so you have 20 minutes left.

Mr. Evans: All right. Can I use one or two more minutes?

The Court: Okay. I apologize for the 40 hours. It wasn't just because it seemed that long, either.

Mr. Evans: I just wondered; a couple of the jurors act as if maybe I had been talking for 40 hours, so I'm not so sure about that. All right. Let me summarize and get right down to it.

We come into this Court. We're to be treated the same as any other person. And we're a corporation; so is the defendant. But in this Court, there is no difference. We're all treated alike. And that's all we ask here. Oh, there's a lot of money involved, but many times there's a lot of money involved, but why should we treat this lawsuit any different than if it's a lawsuit when I sue for somebody bending my fender. I've been damaged. If I've been damaged because of the negligence [1831] of someone, I ought to be compensated. I ought to be made whole. I ought to be placed in the position I was just before I was damaged.

And as I say, if you'll just look this right in the eye, and look through it, you will see that this defense is purely the phantom ice, as I call it. That's the defense they've employed, and I'm sure that if you'll take it step by step, you will say, what difference does it make; 11, 23, 24, 25, 36, 37; what difference? It came down, didn't it. We are out about a million four hundred thousand dollars is all. Thank you.

The Court: Maybe before you start, Mr. Doyle, were you and Mr. Cunningham going to divide your time?

Mr. Doyle: Yes, Your Honor.

The Court: All right. I'm suggesting this: That when you complete, that we'll take a recess, so rather than have a recess after you've completed yours and have only one side available, when you complete yours—would you want about a half an hour, is that it?

Mr. Doyle: Yes, somewhere in there.

The Court: All right. We'll take a recess, then, when you sit down, and then we'll start again with Mr. Cunningham. Very well. Mr. Doyle?

Mr. Doyle: May it please the Court, could I have just a moment to find some—

[1832] The Court: Yes, sir, I'm not going to count this time against you.

Mr. Doyle: All right.

The Court: And I did not count the time against you, Mr. Evans, that I interrupted you.

Mr. Evans: All right; thank you. I didn't know we were down to the last 20 minutes.

The Court: Yes. You probably didn't realize you had used 40 minutes.

Mr. Doyle: May it please the Court; counsel; ladies and gentlemen of the jury: This has been a long case, and I'm sure there are times at this time of the year, especially, when everybody is thinking about Christmas, and what I should be doing, and here you are, you know, you have to listen to a lot of engineering and meteorology, that although this is a very important case, I'm sure there is a —it's sometimes hard to keep your mind all the time on a case.

I, too, want to say that—you know, we lawyers live with a lawsuit for weeks, and we cull through probably at least ten times more information than finally gets out on the witness stand, and we hear it or we see it, and consequently, when we try to recite and tell you what happened in the trial of a lawsuit, we occasionally get confused with what we've heard sometime before. [1833] Now, you people heard it for one time, and that presents a real problem in a complicated case like this, because I know how I was when I started in on this kind of a problem. It takes awhile to get it to soak in, and we hope that we have at

least hit some of the high points, so that you eventually, when you get in to decide the case, will know or realize what's important and what isn't important.

I do want to make a short comment about some of the legal principles that will be involved, and it's always a problem; just how do you tackle trying to explain a case like this, and our purpose is here to help you. And we're advocates. So if we misstate something, why you've got to use your own judgment, but we hope to be of help to you, put it all together, so to speak.

Now, you know this case, this tower came down, and I'm sure all of you must realize that these people, both sides, are sophisticated business people, and I'm sure you must realize that these television stations, with their experts and with their engineers, and with their consultants, aren't like you'd be if you'd go into a store to buy some sort of a sewing machine or any other commodity. These people are—they're sophisticated people; they know; they dealt in this business for years, so don't be led astray that they're babes in the woods [1834] and that they just don't know anything about this, and that they're relying on the tower manufacturer to do everything for them, to serve them, and be something for all purposes.

* * *

The Court: Ladies and gentlemen, you will now direct your attention to the argument of Mr. Cunningham on behalf of the defendant.

Mr. Cunningham: Thank you, Your Honor. Counsel; ladies and gentlemen: I'm going to try not to repeat the areas that have already been covered by Mr. Doyle, but I'm sure that there will be some slippage in that, so please do bear with me if go over the same area just a bit. We're talking about what has been said to be a complex case, but in many respects there are certain basic issues that we can hone in on and dwell upon, and consider them in relation to the three documents: Two jury verdicts and a special interrogatory that you will receive.

Let's first talk about what has been permeating through the trial, that is, the 60 pound per square foot on flats, the uniform wind loading. Without any question, both sides have admitted, that they admitted, testified, whichever way you want it; have agreed that this particular structure, as designed, did comply with that specification, Mr. Hardy, Mr. Minasian, people from Haag, so testified.

Who set that specification? Mr. Evans said it [1853] doesn't make any difference, but it does. And the Court will instruct you in manners in which it does make a

difference. The fact of the matter is, it was a specification that Dresser was to conform to in designing its tower, and the testimony is that it did conform to it. Now, who set the specification? I'm not at all surprised that Mr. Evans would suggest that it really doesn't make any difference, because it's obvious who set the specification. You have and will be able to take with you as exhibits, Exhibit N, AH, AI, and O, and I'm calling them out to you in that order because that is the dating.

Mr. Bentson, who has been referred to thoughout as the official who has signed many of the documents, who has been involved in the tower, but was not here to testify, received a letter from Mr. Bob Trotter: you recall the man from Kline Engineering or Kline Iron & Steel. And in that, by letter of January 24th, he's confirming a telephone conference of last Thursday, January 20th, in which you advise that the specifications—now the "you" is—in which "you", Mr. Larry Bentson, advise that the specifications for the new tower are to be as follows; and then when we get over to number 11, this is what Mr. Bentson specified: Sixty-pound wind loading per EIA specifications, this to be a uniform wind loading for overall height of structure.

[1854] Now, RCA, acting on behalf of its customer, suggests the submitting of a bid on the KELO-KSOO Sioux Falls possible tower. And addresses it to Dresser, and in this instance to Mr. Sload, a letter of February 11th, 1966, and he suggests that we do the bidding, and would appreciate your quote as soon as possible. And he does say that he's enclosing the specifications. Here again, under item 20, we find the same thing for the 60-pound wind loading. This followed the confirmation that this is what Mr. Bentson had been specifying.

Then bracketed on that is another letter from Mr. Trotter dated March 7th, 1966, again to Larry Bentson, confirming a telephone conference with Mr. Bentson on March 4th, again of 1966, obviously, that these are your latest specifications for the tower at Rowena; this then on the bottom, but still item 11: Sixty-pound wind loading per EIA specifications, this to be uniform wind loading for overall height of structure. Suggest that your antenna likewise be designed for 60 pounds to stay on conservative side, and as we know from Mr. Sload, that's what the RCA antenna was designed for.

Now, the fact is—and there can be no question about it from these documents—that the wind loading specification was that—not of Dresser—but rather by and at the direction of the plaintiff in this case. [1855] As the Court will tell you, that where the specification is set—and I'm not trying to give you the exact wording; you take it from the Court; where the specification is set by the customer, and there is compliance therewith, that ends any claim of an express warranty, and that should be the end of that theory of liability, because there's no question, the testimony is complete, that we did meet that specification.

Now, we do have a rather simple thing in this regard. We have a collapse occurring at one place or at another place. There are only two places. And the cause, depending upon where it occurred, is one thing, or allegedly a theory towards another thing. It either collapsed at leg section 11, or as the plaintiff and his experts would have us believe, somehow it developed somewheres in the area of 32 to 36. Again I'm not surprised that Mr. Evans would try to suggest that it's not of consequence, but it is, because it could not have happened and did not happen at 32 or 36, and it did happen at 11, and that triggers why it happened.

* * *

The Court: Mr. Smith, my records would indicate you have 20 minutes.

Mr. Smith: May I have a moment before the clock starts running, just to pick out what I want?

The Court: Very well.

[1868] Mr. Smith: Ladies and gentlemen: It's been a long three weeks, and I am not going to try to—I couldn't in 20 minutes—make any effort to cover everything, so I'm going to have to hit some spots that I think should be left with you as a final argument to you in this case.

I think you all realize, if you stop and analyze it, that the information that we get in this world you might divide into two types: Fact and opinion. We've heard both types of evidence presented to us in this case, and I submit to you that the fact evidence in this case is going to be of utmost importance.

We have listened to expert opinion in the field of meteorology, and engineering, and flying, and it is of great help to us in analyzing what happened, but I think that you'll agree that when we have facts, cold hard facts, such as you and I can see every day in our living, then I think we're going to look at that fact and say, maybe the opinions could have been wrong.

I think of the old saying that we've all heard—this begins to show my age, although I may not date right from the beginning of the flying age, but when there was engineering going on in aerodynamics and flying, engineers came up

with the opinion that the bumblebee couldn't fly, but we all know that the bumblebee does fly, so [1869] something must have been wrong with the engineering equations that they were putting into it.

Now, it has been said that this tower was designed to withstand 60 pounds per square foot wind pressure on the flats. Yes, that was the intention of the design, and I guess all of the witnesses agree that that's what the contract called for, and that's what the design called for. What are the facts? The facts are that we had winds nowhere near enough to exert 60 pounds per square foot. The testimony is we had winds of about half that amount. So the defense is, the tower top had to be coated with ice, and yet we have brought to you—I think I counted at least ten witnesses. Some were out there, like Les Froke, because he had to be; some came along out of curiosity; some came because they wanted to look at the salvage.

Then the investigators came, and of the investigators, Stoney Kirkpatrick was the first professional there Tuesday, right after the Saturday morning that this happened. He came with specific instructions to look for ice. He covered the field; didn't find ice. And he has, in his last session before you, he had calculated if there was ice such as their experts testified to, he told you—what was it—something like—depending on whether you're taking the whole top thousand feet [1870] or less than that, it would run 25 to 48 truckloads of ice, or 3,000-some or 6,000-some bushels of ice, all of which mysteriously disappeared, if we're to accept the defense side of this.

Ladies and gentlemen, you don't need to leave your common sense behind when you go back to deliberate

on this case. If there was all that ice there, such as only—nobody saw it; not a soul saw it. If there was all that ice there, don't you think that there would have been some, in all of the field that these witnesses—some of whom were actually looking for ice—wouldn't they have seen it?

Put this to the test: Let's just suppose that the positions were reversed, and suppose that we were before you as plaintiff, and we were claiming that there was no ice involved, and suppose the ten witnesses came in, people that you had every reason to believe, and testified as to the bushels and truckloads of ice that they saw there; who are you going to believe, the experts that might have said that conditions weren't right for formation of ice, or are you going to believe the people that saw the ice? Now, I think it works just as well. I think that the absence of ice is just as much a fact as if the conditions were reversed and you had witnesses here who said yes, we did see ice.

[1871] And remember, you've had testimony from experts on both sides who have investigated other tower failures where they did find ice, so they know what they're looking for. And don't you think that if the defense could have found anybody that saw one bit of ice, they would have brought them in here at all costs, and they didn't.

Now, I'm going to just refer to one rather technical aspect, and the reason I don't take more is because the time just isn't here. There's the discussion as to whether the failure occurred at section 11, or whether it occurred down here between guys 4 and 5, somewhere in this section (indicating). And Mr. Minasian seems to put just about the eggs in the basket that guy 7 southeast had to have broken under tension.

Let's just put this to the test, and Stoney Kirkpatrick re-

ferred to this: If the failure first occurred in the upper sections of the tower, so that it parted from the rest of the tower and hit guy 7, just watch. You see you've got a tower here that's being guyed—that's being pulled on three sides. If guy 7 is pulled, the rest of it flops like that (indicating); then what happens? It rebounds, because once it breaks, these guys over here, the opposite ones (indicating), give a sling-shot effect the other way, which would have put certainly tower sections to the west and the northwest, and that [1872] isn't what you find in the debris from this pile.

Now, we could go on, and I must leave that point. I simply say, even the expert who comes in here and tells you that he's never made a mistake, even his theories that he has propounded can be put to tests that will show that he hasn't thought this all the way through. I don't think that we should regard this case just as a battle of experts. It was necessary, obviously, to any of us lay people in the field of towers; we here are just as much lay people as you are, so it's necessary that we bring you the expert testimony, but finally in this case, I think the fact testimony is what we're going to follow, because the facts are so clear that there was no ice, there was no wind of the type that that tower was supposed to withstand. So what's the answer? Isn't the answer that they did not supply us with the tower that they had contracted for.

Start right out with the beginning, Lee Heisel testified that way back in '66, when they were first talking about the tower, going together, KSOO and KELO. They were given this brochure by Bob McKinney, the salesman who testified here, the salesman for Dresser. Right on the second page, they tell you: Some of the Dresser-Ideco towers here have

been in service since the very first days of television. That could kind of bear, too, [1873] on the length of life you should expect. In the winter, loaded with ice and hammered repeatedly with gale-force winds, these towers absorb some of the roughest punishment that towers take anywhere in the country.

Now, anybody in the position of Dresser, designing a tower to come out here in South Dakota, has to know that it's got to withstand some wind. They know that we have these blizzards. You can talk about the blizzard of the century, but you also heard testimony that there were three or four others in this same period of years with the same force of wind.

They try to blame this collapse of the tower on the Diety. That always bothers me a little, this Act of God business, but it has become a part of our law, but the Judge is going to read to you the instruction, and I'd like to give it to you once more, because Dresser's liability is not explained away by any act that we're going to blame on our Creator. These are blizzards such as we experience in South Dakota just about every winter, and we'll have some more of them, and anybody selling a tower to go up out here should know that, just as they do when they put them up in Waterloo, in Sioux City, in Bismarck, and the rest of the places through these Northern Plains.

The law on Act of God is that in order for the [1874] combination of—and they claim ice, wind and snow—to come within the term "Act of God", it must have been so unusual and extraordinary a manifestation of nature as could not under normal conditions have been reasonably anticipated or expected.

I think that just a reading of it answers it.

Now, I'd like to review the strict liability theory, because this is a very important part of our case. We feel that the Court will instruct—as Mr. Evans outlined to you, we have three causes of action, three separate ways that Dresser is liable: One, negligence; two, strict liability; three, breach of express warranty.

On strict liability, the requirements—and if you'll listen when the Judge instructs you, you'll catch these, I do believe:

That the product that the manufacturer has sold must have been in a defective condition; second, that the defective condition must have made it—and I'll call it the tower, because that's what we're dealing with here—unreasonably dangerous to the user; third, that the defect must have existed at the time it left the control of Dresser; fourth, that the tower was expected to and did reach Community Television without any substantial change in the condition it was in when it left the control of Dresser; fifth, that Community TV used [1875] the product in a manner in which Dresser could reasonably anticipate it would be used.

Now, isn't that exactly what we have here? The tower had to have been in a defective condition or it would have withstood the 60 pounds per square foot wind pressure that it was designed and was supposed and contracted for. It didn't. That itself proves it was defective. It was unreasonably dangerous. Nobody can deny that a 2,000-foot structure like that, all of the hundreds of thousands of tons that it weighed, if you figure it out, if that's going to collapse, you've got engineers down in the building below, and so forth; it is unreasonably dangerous if it isn't going to stand. It's preposterous to say that two people that have

been described by Mr. Doyle as sophisticated; I don't know whether I want to agree to that on all scores, but the two people that contract to put up a 2,000-foot structure, if they didn't think it was going to stand. I don't think any of us are going to buy that for a minute. So strict liability, we feel, is exactly the situation we have here.

Now, they try to defend on the ground that, well, other tower manufacturers aren't doing any better. You can use your own judgment on that. You can consider the other towers that did stand in the same area of this [1876] storm, this storm that came up out of the Panhandle in Texas, and raged, as our meteorologist told you, but that's not an answer. If you'll listen carefully, I believe you're going to hear the Judge instruct you that when one makes possible a situation which creates an unreasonable risk of harm to another, the fact that others also do so is not an absolute defense. It'll go on. I won't take more time on that one, but Mr. Doyle read one instruction that he expects on that. I simply tell you that the Court will tell you, I believe, that this is not a defense, just that others in the industry are doing about the same.

I believe Mr. Doyle made probably an error that he didn't intend to. I wrote this carefully. He said that this dynamic resonance that we have been telling you about, and that Dr. Nelson and Emory Johnson and Tex Hardy testified to, Mr. Doyle said in his remarks a few minutes ago, dynamic resonance occurs because of fatigue. He's got it backward. It's the fatigue that is the result of the dynamic resonance. The structure goes into resonance—and now we're getting into technical stuff again, and I don't think I want to take a great deal of time on it, but we have showed

to you several examples of how structures, objects, can collapse because they go into just their harmonic vibration. This was an [1877] explanation. It's not the only possible explanation for this, but it is an expert opinion on what caused the collapse of the tower.

But I like to come back to the facts. We can argue these opinions, and we've been doing it, and I can well understand how you may wonder, which expert should we go along with, so I suggest, go along with the expert who is also backed up by the fact witnesses, the fact witnesses who said despite what all this Chicago meteorologist may say about conditions being right for ice, there simply wasn't ice. We didn't find any there. It couldn't have been there. We covered the territory.

Nobody has testified that there were winds any stronger than the 70, gusts to 80, something like that, miles an hour, which they translate to about 30 pounds per square foot, not 60. So we don't have the ice; we don't have the wind. We are driven to the conclusion, number one, that there is strict liability, because they gave us a defective tower which didn't withstand what anybody should expect. They're negligent for those same reasons. They didn't live up to the warranty.

And I won't take the time; the contract is there. I think it's Exhibit 26, and if you'll leaf through, I think it's about the third page, specially typewritten, not just the boilerplate that we refer to on their form, [1878] but specially written, 60 pounds per square foot.

And I repeat: It does not matter. We do not agree that we specified it. Mr. Doyle may have complimented us in calling us sophisticated people. I do believe that our people

are sophisticated in running a television station, in knowing how to send television programs to all of us. I don't think they claim that they're sophisticated in knowing how to design a structure 2,000 feet high to withstand the climatic conditions that are expected here. They rely on the people who know for that.

The Court: You have one minute to conclude.

Mr. Smith: Thank you. True, RCA naturally wants a tower that will support its antenna, so it's going to suggest the 60 psf. That was an industry standard, anyway. I don't think anybody argues that it wasn't proper. We say that the tower did not live up to those specifications.

Now, in the last 30 seconds, when you're considering damages, we introduced for your aid, because there's a whole batch of cancelled checks, and contracts, and invoices, and I don't expect anybody to go out and try to add them all up. Nobody questions that they're properly added here.

In Exhibit 100, we show the various suppliers, whether what they supplied was the tower, the antenna [1879] and lines, or the buildings, the amount of money, and it takes three pages of that. The total amount is $1,448,919.

Then on Exhibit 101, we deducted the depreciation, and we get down to a net figure, replacement cost less depreciation, of $1,403,000.

Now, I submit to you, just as Mr. Evans suggested: If your house is destroyed, it doesn't matter that you were able back in 1968 to build it for $40,000. If it costs $65,000 today, and if you're replacing exactly the same house, then that's the amount of your loss, less the six or seven years of depreciation that should be taken. That's exactly what we have done here, and the defense has not come in with any

exhibits to counter this. They haven't suggested any other method, other than just in the argument here.

We submit that these two exhibits, 100 and 101, should guide you.

We leave it in your good judgment as to what would put Community Television in the same position it was before the tower went down, that is, replace the money that it would take to restore the facility that was destroyed.

It's been a very interesting three weeks, and I join all the others in thanking you for your attention. [1880] I want to say this, too: It's been a nice case to try, because they've been gentlemen that we've been dealing with on the other side. I have enjoyed working with Harold Doyle and Alan Cunningham, and I know that my partner, Ellsworth Evans, would say the same.

Thank you.

Jury Instructions

The Court: Very well. Ladies and gentlemen of the jury: Now that you've heard the evidence and the argument, it becomes my duty to give you the instructions of the Court as to the law applicable to this case.

I might also explain, as most of you are familiar with, you will not receive a written copy of the instructions, so you should pay careful attention to the oral instructions which I am now about to read to you. It is your duty as jurors to follow the law as stated in the instructions of the Court, and to apply the rules of law so given to the facts as you find them from the evidence in the case.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law stated by the Court. Regardless of any opinion

you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict [1881] upon any other view of the law than that given in the instructions of the Court; just as it would be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything but the evidence in the case.

Justice, through trial by jury, must always depend upon the willingness of each individual juror to seek the truth as to the facts from the same evidence presented to all the jurors; and to arrive at a verdict by applying the same rules of law, as given in the instructions of the Court.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the Complaint of the plaintiff, Community Television Services, Incorporated, and the Answer thereto of the defendant, Dresser Industries, Incorporated. You are to perform this duty without bias or prejudice as to either party. The law does not permit jurors to be governed by sympathy, prejudice, or public pinion. Both the parties and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the Court, and reach a just verdict, regardless of the consequences.

Now, this case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or [1882] similar stations in life. One corporation is entitled to the same fair trial at your hands as another corporation. The law is no respector of persons; all persons, including corporations, partnerships, unincorporated associations, and other lawful organizations, stand equal before the law, and are to be dealt with as equal in a Court of justice.

Now, the plaintiff, Community TV, brings this lawsuit

against the defendant, Dresser, for damages sustained when a television and radio transmitting tower designed, manufactured and erected for the plaintiff by the defendant collapsed on January 11th, 1975. The case is being submitted to you on three separate causes of action.

In the first cause of action, based on negligence, plaintiff alleges that during the year 1969, the defendant furnished material and equipment and erected the tower for the plaintiff; that defendant, by reason of having erected similar towers in states surrounding South Dakota, was familiar with the terrain, weather, atmospheric conditions and temperatures changes in and around Rowena, South Dakota; that plaintiff relied upon defendant's special knowledge and expertise in the field of tower design and manufacture; that defendant carelessly and negligently failed to properly design the [1883] tower, failed to provide material of adequate strength to support it, and failed to determine whether the design and material was suitable for the climatic conditions it knew would occur at the place where the tower was erected. Further, plaintiff alleges that defendant negligently failed to provide a tower that would withstand wind of a velocity exerting 60 pounds per square foot on flat surfaces forming a part of the tower.

Now, plaintiff alleges that as the direct and proximate result of the defendant's negligence, the tower collapsed on January 11th, 1975, damaging the tower, television antenna and other equipment upon it and one building beyond repair, and severely damaging another building, all of said property being owned by the plaintiff.

In its second cause of action, and as an alternative, plaintiff claims that the defendant, who was in the business of

manufacturing and selling such towers, is strictly liable for damages by reason of having sold, erected and delivered the tower to plaintiff in a defective condition, unreasonably dangerous to the user, which defect existed at the time the tower left the control of the defendant and continued without substantial changes until the tower collapsed. Plaintiff further alleges that it used the tower in the manner in which defendant [1884] could reasonably anticipate it would be used.

In its third cause of action, and as an alternative plaintiff alleges that defendant is liable for damages on the ground that the defendant expressly warranted to plaintiff, in the sale of the tower, that the tower would withstand wind pressure of 60 pounds per square foot on its flat surfaces, when in fact the tower collapsed under less wind pressure than that for which it was warranted.

Now, the defendant contends that the plaintiff requested bids from the defendant and other tower manufacturers for a tower with a wind loading specification of 60 pounds per square foot on the flat surface and that the defendant submitted specifications in accordance with the plaintiff's request.

The defendant further claims the tower collapsed because it was struck by a violent blizzard with winds and snow after it was loaded with ice in the top sections; and that the combination of ice, snow and wind subjected the tower to a total force not only in excess of the designed wind loading of 60 pounds per square foot but also greater than the ultimate capacity of the structural elements of the tower.

The defendant also claims the tower failed because of an Act of God for which it would not be liable.

[1885] The defendant further contends that it used reasonable care in the design of the tower utilizing the latest design and engineering analysis methods. Also, that the design was not defective nor unreasonably dangerous because the tower was designed to withstand a static wind loading which at the time the tower was erected was the standard practice in the industry and is even the standard practice today. Furthermore, when the tower in question was erected —this is the claim—it was not within the state of the art to design such a tower to withstand dynamic wind forces; and, in fact, it is not within the state of the art even today to design such a tower to withstand such forces.

Now, these claims by the parties form the issues of fact to be determined by you from the evidence received at the trial under the law applicable to the case as stated in these instructions.

The burden is on the plaintiff in a civil action such as this, to prove every essential element of its claim by a preponderance of the evidence. If the proof should fail to establish any essential element of the plaintiff's claim by a preponderance of the evidence in the case, the jury should find the defendant as to that particular claim.

To "establish by a preponderance of the evidence" [1886] means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true.

In determining whether any fact in issue has been proved by a preponderance of the evidence in the case, the jury may, unless otherwise instructed, consider the testimony of all

witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

Although the burden is on the party who asserts the affirmative of an issue to prove his claim or its claim by a preponderance of the evidence in the case, this rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

In a civil action such as this, it is proper to find that a party has succeeded in carrying the burden of proof on an issue of fact if, after consideration of all the evidence in the case, the jurors believe that what is sought to be proved on that issue is more likely true than not true.

There are, generally speaking, two types of evidence [1887] from which a jury may properly find the truth as to the facts of a case. One is direct evidence—such as the testimony of an eyewitness. The other is indirect or circumstantial evidence—the proof of a chain of circumstances pointing to the existence or nonexistence of certain facts.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of the evidence in the case, both direct and circumstantial.

Statements and arguments of counsel are not evidence in the case, unless made as an admission or stipulation of fact. There have been several of those, of course, you will recall. When the attorneys on both sides stipulate or agree as to the existence of a fact, the jury must, unless otherwise instructed, accept the stipulation as evidence, and regard that fact as conclusively proved.

Unless you are otherwise instructed, the evidence in the case always consists of the sworn testimony of the witnesses,

regardless of who may have called them; and all exhibits received in evidence, regardless of who may have produced them; and all facts which may have been admitted or stipulated.

Now, any evidence as to which an objection was [1888] sustained by the Court, and any evidence ordered stricken by the Court, must be entirely disregarded.

Unless you are otherwise instructed, anything you may have seen or heard outside the Courtroom is not evidence, and must be entirely disregarded.

You are to consider only the evidence in the case. But in your consideration of the evidence, you are not limited to the bald statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as seem justified in the light of your experience.

Inferences are deductions or conclusions which reason and common sense lead the jury to draw from facts which have been established by the evidence in the case.

Now, since a corporation can act only through its officers, or employees, or other agents, the burden is upon the plaintiff to establish by a preponderance of the evidence that the negligence, if any, or actions of one or more officers, or employees, or other agents of the defendant corporation, that is, Dresser Industries, was a proximate cause of any injuries and consequent damages sustained by the plaintiff, Community TV.

Any act or omission of any officer, or employee, [1889] and that would be of both corporations, or other agent, of a corporation within the scope of his employment is held in law to be the act of the corporation.

Now, one of the theories or the first theory that the plaintiff Community TV claims makes the defendant Dresser liable to it is the matter of negligence.

Now, negligence is the failure to exercise ordinary care under the circumstances; that is, the failure to use such care as a reasonable person would use under the same or similar circumstances.

As applied to the manufacture and sale of a product, it means the failure of a manufacturer or seller to do something that a reasonably careful manufacturer or seller engaged in the same business would do, or the doing of something by a manufacturer or seller that a reasonably careful manufacturer or seller engaged in the same business would not do. The degree of care must be equal to the danger reasonably to be anticipated, measured by all the facts and circumstances.

A manufacturer of a product has a duty to use ordinary care in the design of the product. This means the manufacturer must design the product so that it will fairly meet the uses which can reasonably be anticipated. Failure to fulfill this duty constitutes negligence.

Now, negligence, to be the basis of an award of [1890] damages, must have been a proximate cause of the injury.

The proximate cause of an injury is that cause which is an immediate cause and which in natural and probable sequence produced the injury, and without which it would not have been sustained. It need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it, causes the injury.

Now, the mere fact, standing alone, that the tower collapsed does not of itself establish any negligence on the part of the defendant.

Defendant was not an insurer of the safety of the tower nor does the mere occurrence of a collapse create any inference of negligence on the part of the defendant.

In determining whether or not the defendant acted with due care, you must consider the state of engineering knowledge as of the time the tower was designed. It is what the defendant then knew, or, in the exercise of reasonable care should have known, that is important. You cannot judge its conduct from the vantage point of hindsight.

In determining whether or not a defendant may be liable, you are entitled to consider that it followed practices common to the industry generally at the time the tower was manufactured.

[1891] If defendant follows what at the time of manufacture was a practice common to the industry, it would, though not conclusive, tend to show due care on the part of the defendant.

Now, when one makes possible a situation which creates an unreasonable risk of harm to another or another's property, the fact that others also do so is not an absolute defense. Evidence of the customary practice within the industry, although admissible, is not essential to finding of negligence. Indeed, evidence of what is usually done is not necessarily what ought to be done, and is therefore not necessary to prove negligence.

In determining whether the defendant was negligent under Count One, that is, the negligence Count, of the Complaint, you shall consider the state of development of tower design as it existed at the time the tower in question was made in 1968.

The defendant cannot be held liable under the claim of negligence for failing to use scientific computations and design techniques which were beyond the state of the art when the tower was made.

It is the duty of the plaintiff to reasonably maintain the tower, including the tensioning of guys.

Now, one who as a manufacturer makes and sells a [1892] tall tower in a defective condition unreasonably dangerous to the user or to his property is subject to liability for physical harm thereby caused to any ultimate user or to his property if such manufacturer is engaged in the business of selling such tower and the tower is expected to and does reach the user without substantial change in the condition in which it was sold.

This liability is known in the law as "strict liability", and applies although the seller as manufacturer has exercised all possible care in the manufacture and sale of the tower.

This rule of strict liability as stated in this instruction does not rest solely upon negligence; it is strict liability imposed without reference to the lack of care exercised by the manufacturer.

With respect to the claimed defective condition of the tower, I will advise you that subject to the defenses previously indicated, a manufacturer of a product is liable for injuries proximately caused by its product if,

First, it was in a defective condition;

Second, the defective condition made the tower unreasonably dangerous to the plantiff user;

Third, the defect existed at the time it left the control of the defendant;

Fourth, the tower was expected to and did reach the

[1893] plaintiff user without any substantial change in the condition it was in when it left the control of the defendant; and

Fifth, the plaintiff user used the product in a manner in which the defendant could reasonably anticipate it would be used.

I will advise you further that a product is in a defective condition if it is not reasonably fit for the ordinary and reasonable foreseeable purposes for which it was sold or manufactured and expected to be used.

I will advise you that even though the defendant exercised all possible care in the manufacture of the product, if it was nonetheless in a defective condition unreasonably dangerous to users at the time it left the control of the defendant, it is liable for injuries proximately caused thereby.

Now, the rule applies only where the product is, at the time it leaves the manufacturer's hands, in a condition not contemplated by the ultimate consumer, who in this case is the plaintiff, and which will be unreasonably dangerous to him. In this regard, the manufacturer is not liable if he delivers a product in a safe condition and subsequent misuse or other causes make such product harmful or dangerous. Similarly, a product is not in a defective condition when it is safe for normal use and [1894] handling or when the plaintiff is aware of the condition of which he complains.

Now, a manufacturer or a seller of a product which he knows, or by the exercise of ordinary care should know, is potentially dangerous to users thereof, has a duty to give adequate warning of such danger where injury to a user thereof can be reasonably anticipated if an adequate warning is not given.

Now, a purchaser or user of property has a duty to use ordinary care for its protection. He must exercise such care with reference to those obvious defects and dangerous conditions about which he knows and understands or about which he should know and understand.

In determining whether the defendant is liable under Count Two of the Complaint pertaining to strict liablity for sellng the plaintiff the tower in question with a defective design and unreasonably dangerous, you shall consider the state of development of tower design as it existed at the time the tower in question was made in 1968.

The defendant cannot be held liable on any claim of selling the plaintiff a tower with a defective design and which was unreasonably dangerous if it failed to use scientific computations and design techniques which were beyond the state of the art when the tower was made.

[1895] Now, in this case the plaintiff seeks to establish liability on a third theory, which is breach of warranty, on which I will now instruct you; a breach of express warranty, actually. A breach of warranty may be established without proof of negligence on the part of the defendant.

In this case it has been established that a sale of a tall tower was made by the defendant, as seller, to the plaintiff, as buyer, at the time and place alleged by the plaintiff.

Now, any affirmation of fact or promise made by the seller to the buyer which relates to the goods or product and becomes part of the basis of the bargain creates an express warranty that the goods or product shall conform to the affirmation or promise. Such affirmation or promise may be oral or in writing.

Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

No particular word or form of expression is necessary to create an express warranty, nor is it necessary that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty.

The South Dakota statute on express warranty [1896] provides:

Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

The contract between Community Television Services, Incorporated, and Dresser Industries contained, among others, the following specification:

The tower shall be designed to resist a uniform wind load per drawing T-5172, sheet S-1, of 60 PSF, or pounds per square foot, on flats, or flat surfaces.

This technical specification constituted an express warranty that the structure would withstand wind exerting a pressure of 60 pounds per square foot on the flat surfaces of the tower.

To recover damages for breach of an express warranty, plaintiff must prove:

First, an affirmation of fact or promise made by defendant to plaintiff relating to the tower;

Second, such affirmation of fact or promise became a part of the basis of the bargain;

[1897] Third, that plaintiff, in making the purchase, relied on the representations, affirmations of fact or promises;

Fourth, that the tower sold by the defendant failed to comply with the promises or affirmations of fact made by the defendant;

Fifth, that the plaintiff, because of such failure, was damaged, and

Sixth, such failure to comply was a proximate cause of that damage.

If plaintiff fails to establish any of these, it cannot recover for a claimed breach of express warranty.

The defendant was not an insurer of the safety of the tower nor does the mere occurrence of a collapse create any inference of a breach of any warranty.

If you find that the pertinent tower specifications were set by the plaintiff or by its direction, and if you find that the tower supplied by the defendant conformed to those specifications, then there can be no breach of an express warranty on the part of the defendant.

A seller is not liable for a breach of warranty unless the buyer gave him notice of such breach within a reasonable time after the buyer knew, or a reasonable person ought to have known of the alleged breach of warranty. What amounts to a reasonable time depends on [1898] the circumstances and the kind of product involved.

Notice may be oral or in writing; no particular form of notice is required. It merely must inform the seller of the alleged breach of warranty and the buyer's intention to look to him for damages. Whether the buyer gave this information to the seller, and if so, whether he acted within a reasonable time in this case, is for you to determine.

In order to permit recovery under any of these three legal theories, that is, negligence, strict liability or breach of warranty, the breach of the legal duty must have been a proximate cause of the loss sustained.

The defendant, Dresser Industries, contends that the tower owned and operated by the plaintiff, Community TV, failed because of an Act of God for which it would not be liable. In order for the combination of ice, wind and snow, as contended by the defendant, to come within the term "Act of God", it must have been so unusual and extraordinary a manifestation of nature as could not under normal conditions have been reasonably anticipated or expected. An Act of God does not necessarily mean an operation of natural forces so violent and unexpected that no human foresight or skill could probably have prevented its effect. It is enough that the combination [1899] of ice, wind and snow be so extraordinary that in the exercise of human foresight, it could not reasonably be anticipated.

Now, in the event that you find that the plaintiff, Community TV, is entitled to recover against Dresser Industries on either the theory of negligence or strict liability, you must then fix the amount of money which will reasonably and fairly compensate plaintiff for all the detriment proximately caused thereby, whether it could have been anticipated or not.

Now, in the event you find that the plaintiff, Community TV, is entitled to recover against the defendant, Dresser Industries, on the basis of breach of express warranty, you must then fix the amount of money which will reasonably and fairly compensate the plaintiff for all the detriment proximately caused thereby. You may not, however, in the case of the claim of breach of warranty, include compensation for any item of damage which the seller, Dresser Industries, could not have reasonably foreseen at the time the contract was entered into.

Now, plaintiff's damages may be ascertained by deter-

mining the cost of constructing a similar tower, replacing the antenna, repairing the damaged buildings, and deducting therefrom the depreciation suffered by [1900] reason of age and use, unless such cost is greater than the difference between the before and after value of the tower, antenna and buildings damaged, in which case the difference in market value before and after the collapse would be the proper measure of damages.

You are instructed that the question of damages is an entirely distinct different question from the question of liability, and you must not consider the question of damages in this case until you have determined that the defendant is liable for the damages claimed by the plaintiff. That the Court gives instructions on damages or that counsel for either party may have discussed the subject is not to be taken by you as an intimation by the Court or as any admission by such party of its liability for the damages claimed by the plaintiff.

Now, the rules of evidence ordinarily do not permit witnesses to testify as to opinion or conclusions. An exception to this rule exists as to those whom we call "expert witnesses". Witnesses who, by education and experience, have become expert in some art, science, profession, or calling, may state an opinion as to relevant and material matter, in which they profess to be expert, and may also state their reasons for the opinion.

You should consider each expert opinion received in evidence in this case, and give it such weight as you [1901] may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, you may disregard the opinion entirely.

Now, the law does not require any party to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue at this trial. Nor does the law require any party to produce as exhibits all papers and things mentioned in the evidence in the case.

However, in judging the credibility of the witnesses who have testified, and in considering the weight and effect of all evidence that has been produced, the jury may consider failure of a party to call other witnesses or to produce other evidence shown by the evidence in the case to be in existence and available to such party.

Now, you, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. Ordinarily, it is assumed that a witness will speak the truth. But this assumption may be dispelled by the appearance and conduct of the witness, or by the manner in which the witness testifies, or by the character of the testimony given, or by evidence to the [1902] contrary of the testimony given.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider the witness' ability to observe the matters as to which he or she has testified, and whether he or she impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or [1903] intentional falsehood.

After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves.

A witness may be discredited or impeached by contradictory evidence; or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

Now, during the course of a trial, I occasionally ask questions of a witness, in order to bring out facts not then fully covered in the testimony. Do not assume that I hold any opinion on the matters to which my questions may have related. Remember at all times that you, as jurors, are at liberty to disregard all comments of the Court as to the facts in arriving at your own findings as to the facts.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

[1904] It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans, you are judges—judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

It is proper to add the caution that nothing said in these instructions—nothing in any form of verdict prepared for your convenience—is to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is the sole and exclusive duty and responsibility of the jury.

Upon retiring to the jury room, you will select one of your number to act as your foreperson. The foreperson [1905] will preside over your deliberations and will be your spokesperson—you know I'm up on the new language —will be your spokesperson here in Court.

Now, we have provided two forms of verdicts and one special form of Special Interrogatories. I'll read all three, omitting the formal parts. Now, one of the verdicts, as proposed, is:

We, the jury, find in favor of the defendant, Dresser Industries, Incorporated, a corporation, and against the

plaintiff, Community Television Services, Incorporated, a corporation.

If all six of you unanimously agree on that verdict, you don't need to go any further.

The other verdict is:

We, the jury, find in favor of the plaintiff, Community Television Services, Incorporated, a corporation, and against the defendant, Dresser Industries, Incorporated, a corporation, and assess plaintiff's damages in the amount of so many dollars.

Now, if you unanimously agree that that is your verdict, and you will unanimously agree on the amount of damages that are appropriate, then you do have to go to the Special Interrogatories, which is a longer form, and which, omitting the formal parts, reads this way:

We, the jury, having found for the plaintiff, [1906] Community Television Services, and against the defendant, Dresser Industries, Incorporated, answer the questions submitted by the Court as follows:

First, did you find defendant Dresser Industries, Incorporated, liable based on:—and there are three blanks—"a" is Negligence, and you will say "yes" or "no". And this is in case of a plaintiff's verdict.

"b" is Strict Liability, and you say "yes" or "no". "c" is Breach of Warranty, and you say "yes" or "no".

Now, before you can say "yes" or "no", all six of you must agree on that particular answer.

Now, you will take these forms to the jury room, and when you have reached unanimous agreement as to your verdict, as well as the Interrogatories if you find in favor of the plaintiff, you will have your foreperson fill in, date and sign the form that sets forth the verdict upon which you

have unanimously agreed, and then return with your verdicts to the Courtroom.

If it becomes necessary during your deliberations to communicate with the Court, you may send a note by the Marshal, signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with the Court by any means other than a signed writing, and the Court will never communicate with any member of the jury on any subject touching [1907] the merits of the case, otherwise than in writing or orally here in open Court.

You will note from the oath that will be taken shortly by the Marshals that they, too, as well as all other persons, are forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of this case. Bear in mind also that you are never to reveal to any person, not even to the Court, how the jury stands, numerically or otherwise, on the questions before you, until after you have reached a unanimous verdict.

The Rules also provide that I must give counsel on both sides an opportunity to make objections to certain of the instructions that they may disagree with, or to call my attention to something that I may have incorrectly stated or omitted.

I'm going to send you out to the jury room. This is the last time that I'm still going to say you can't discuss the case, because it is possible that in this matter that we'll have here in the Courtroom, that my attention may be called to an instruction I've overlooked or something I should correct, in which event you'd be brought back in, and I would make that correction or addition. So you shouldn't start deliberating yet or discussing the case, but

we trust this won't be very long, [1908] and then the case will be given to you and I will excuse the two alternates that we have at that time. You can stick with them for this next few minutes, however, in the jury room, but do not discuss the case yet or start your deliberations yet.

You may retire to the jury room at this time.

Plaintiff's Post Trial Brief

By its verdict, the jury found that the Defendant had breached the express warranty contained in the type-written specifications of the contract to-wit:

> "The tower shall be designed to resist a uniform wind load per drawing T-5172, Sheet S-1, 60 psf on flats".

In its motion for judgment notwithstanding the verdict or for a new trial the Defendant contends that its warranty was limited by item 9, printed in minuscule type on

the reverse side of the printed contract form; that the purpose of the warranty was to provide a limited and exclusive remedy to repair, replace or refund for a period of six months; and that such limited warranty "provided a minimum adequate remedy fully sufficient to meet the requirements of the Uniform Commercial Code and South Dakota law."

The court's ruling denying the Defendant's Motion for Directed Verdict and the jury verdict are fully supported on all of the following grounds:

1. The description of the tower (designed to resist a uniform wind load of 60 psf) created an *express* and *explicit warranty* that the tower would conform to that description.
2. The *time* specified in item 9 for the period of the warranty and for the submission of a warranty claim was *manifestly unreasonable*.
3. The attempted *disclaimer* of liability in the last paragraph of item 9 was *manifestly unreasonable* and did not meet the statutory obligations of good faith, diligence, reasonableness and care imposed upon the Defendant.
4. The provisions of item 9 providing for the *limited remedy* of the Plaintiff and *limited damages* in the event of breach of warranty were *unconscionable*.
5. The attempted *exclusion of consequential damages* to the antenna and buildings was *unconscionable*.
6. The circumstances of this case caused the exclusive or limited remedy of item 9 to *fail of its essential purpose*.

7. The attempted limitation of the effective period of the warranty to six months after plaintiff's acceptance of the tower cannot be enforced where the warranty as to resisting a wind load of 60 psf *extended to future performance* of the tower and discovery of the breach necessarily awaited the time of such performance.
8. The attempted *reduction of the period of limitation of time* for bringing a warranty claim to six months after breach did not comply with the South Dakota statute.
9. Insofar as the contract attempted to *fix the amount of damage or compensation for breach in anticipation of such breach*, it was void under the statute.
10. The Defendant's construction of words in item 9 tending to negate or limit the express and implied warranty is unoperative.
11. Damages were correctly assessed.

I.

THE DESCRIPTION OF THE TOWER (DESIGNED TO RESIST A UNIFORM WIND LOAD OF 60 PSF) CREATED AN EXPRESS AND EXPLICIT WARRANTY THAT THE TOWER WOULD CONFORM TO THAT DESCRIPTION.

SDCL 57-4-27 (UCC §2-313) provides:

> "57-4-27. *Express Warranty That Goods Conform to Description Made Part of the Basis of the Bargain.*—Any description of the goods which is made part of the basis of the bargain creates an ex-

press warranty that the goods shall conform to the description."

S-C Industries v. *American Hydroponics System, Inc.*, 468 F. 2d 852 (5th Cir. 1972) is directly in point. There the Court of Appeals, in applying the Texas statute (the same as SDCL 57-4-27) recognized that technical specifications may constitute a warranty without the need of any special language. In *S-C Industries*, the manufacturer gave specifications that the steel truss to be used in the erection of a greenhouse would withstand "20 PSF Snowload, 16 PSF Windload." When the greenhouse collapsed and the purchaser sued, the manufacturer argued that the quoted matter did not constitute a warranty, but merely a specification. Answering this argument, the court said:

> . . . "Technical specifications may constitute a warranty, however, even to the extent of displacing the warranties created by inconsistent samples, models, or general language of description. American's contention that this specification could not constitute a warranty is without merit.
>
> [2] American further contends that its special warranty was sufficient to supersede all other warranties, including the express warranty of the specification as described in the preceding paragraph. The general language of that special warranty does not mention the written express warranty which American had given S-C. The only reasonable interpretation that can be placed on this special warranty in light of the prior specific warranty, is that it applies only to any defects which might be found to exist in the various components and other materials

which American sold. Thus, while the special warranty form provided the exclusive remedy should any component be defective, it did not supersede the specific express warranty which extended to the design capability of nondefective structural members intended to perform as an integral part of the greenhouse building.

[3] We agree with the court below that the specifications created an express warranty that the structure as a unit would withstand a vertical load of 20 pounds per square foot. Since that court found as a fact that the collapse of the structure was a result of its weakening under a load of less than 20 pounds per square foot, we also agree with the court's conclusion that there was a breach of the express warranty.

[4, 5] We further conclude that there was a breach of American's implied warranty of merchantability, since the building was clearly not fit for the ordinary purpose for which such goods are used. The purchase order and the special warranty did not exclude such an implied warranty since the language was not conspicuous and did not mention merchantability.

[6] American next urges that, even if there was a breach of any warranty, the recovery is limited by the special warranty to 'the original purchase price of the specific item purchased, should it be determined to be defective.' In effect, American contends that the court must fragment the greenhouse sale into separate sales of each constituent part and allow a

recovery only for the inadequate steel trusses which occasioned the collapse of the structure. While Texas law clearly permits a seller to limit his liability to repair and replacement of goods which do not conform to the contract, we decline to construe the special warranty to have that effect under the facts in this case. American contracted to sell an entire greenhouse with a specific warranty that, if properly constructed according to the plans provided by American, it would withstand a certain load. American was no ordinary seller of construction materials; it had assembled the plans and components for the purpose of enabling the purchaser to acquire a complete hydroponic system. The language of the purported limitation does not so clearly disclaim responsibility for the greenhouse as a unit as to oblige this court to disregard the realities of the situation and view the transaction as a collection of purchases of individual building components." (468 F. 2d at 854, 855).

There is no doubt that the South Dakota Supreme Court would find the tower design specification to be an express warranty. See *Swenson* v. *Chevron Chemical Company*, — S.D. —, 234 N.W. 2d 38 (1975), where the South Dakota court, following the Uniform Commercial Code, found a representation on the label of a bag of chemical to constitute an express warranty.

II.

THE TIME SPECIFIED IN ITEM 9 FOR THE PERIOD OF THE WARRANTY AND FOR THE SUBMISSION OF A WARRANTY CLAIM WAS MANIFESTLY UNREASONABLE.

SDCL 57-1-14 (UCC §1-204) provides:

> "57-1-14. *Time—Reasonable Time—Action Taken Seasonably—Definition.*—Whenever this title requires any action to be taken within a reasonable time, any time which is not manifestly unreasonable may be fixed by agreement. What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action. An action is taken 'seasonably' when it is taken at or within the time agreed or if no time is agreed at or within a reasonable time."

The particular words on which the Defendant relies as a time limitation of its warranty, so far as applicable to the evidence in this case, are contained in the fine print matter on the back of the contract form in item 9, as follows:

> "Seller warrants, for a period of six months, that products of its own manufacture and any construction performed hereunder by the Seller shall meet the applicable specifications incorporated in this contract, and be free from defects in material and workmanship. Provided Buyer submits a claim in writing to Seller immediately upon its discovery and in any event within six (6) months . . . after final acceptance by Buyer if construction work is performed, . . .

> Seller shall, at Seller's sole option, repair, replace or refund an equitable portion of the purchase price of any product or work which Seller determines to have been defective or failed to meet applicable specifications. . . ."

This six month warranty was manifestly unreasonable as a guaranty for a television tower which had a projected useful life of 25 to 50 years. When the express and explicit warranty provided that the tower was to be designed to resist a uniform wind loading of 60 pounds per square foot while supporting antennas and other associated equipment as described in the specifications, it was manifestly unreasonable to provide on the back of the printed form that the warranty was good for only six months, provided the Buyer submit a claim within six months after final acceptance, when the Buyer would have no way of knowing whether the tower would withstand such wind loading until it had been subjected to high winds. Failure of the tower to withstand such wind load would constitute a latent defect not discoverable until after the time specified had elapsed.

Neville Chemical Company v. *Union Carbide Corporation*, 422 Fed. 2d 1205 (3rd Cir. 1970) is authority for this proposition. The Court of Appeals said:

> "The first provision on which *Carbide* relies to bar its liability is the fifteen day notice requirement. This requirement is manifestly unreasonable if it is construed to require that notice be given of *latent* defects which would not be discoverable until after the time specified has elapsed.
>
> . . .

> The same result would follow under the Uniform Commercial Code. The trial court decided that the notice requirement was ineffective under Section 1-204(1) of the Uniform Commercial Code, which states that 'Whenever this Act requires any action to be taken within a reasonable time, any time which is not manifestly unreasonable may be fixed by agreement.' Just as a seller of tulip bulbs from Holland could not bar claims against it for defective bulbs by requiring notice before the bulbs would normally bloom, *Vanderberg & Sons, N.V.* v. *Siter*, 204 Pa. Super. 392, 204 A. 2d 494 (1964), *Carbide* could not require notice of a defect in its chemical products at a point in time at which it was impossible to discover the defect. 294 F. Supp. at 655." (422 F. 2d at 1217 and 1218).

III.

THE ATTEMPTED DISCLAIMER OF LIABILITY IN THE LAST PARAGRAPH OF ITEM 9 WAS MANIFESTLY UNREASONABLE AND DID NOT MEET THE STATUTORY OBLIGATION OF GOOD FAITH, DILIGENCE, REASONABLENESS AND CARE IMPOSED UPON THE DEFENDANT.

The disclaimer of liability contained in the last paragraph of item 9 reads as follows:

> "Except for obligations expressly and specifically assumed under the other clauses of these Sales Terms, the foregoing is Seller's only warranty, obligation, and liability, under tort (including alleged negligence) contract or otherwise for or in connection with

its products, work and services or use thereof. THE FOREGOING IS EXPRESSLY IN LIEU OF ALL OTHER WARRANTIES WHATSOEVER, EXPRESS, IMPLIED AND STATUTORY, INCLUDING, WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS. IT IS SPECIFICALLY UNDERSTOOD SELLER'S PRICE IS BASED UPON THE FOREGOING LIMITATION OF LIABILITY AND BUYER'S WAIVER OF ANY AND ALL CLAIMS FOR DAMAGES.

SDCL 57-1-5 (UCC §1-102) provides:

"57-1-5. *Variation of Effect of Provisions of Title by Agreement.*—The effect of provisions of this title may be varied by agreement, except as otherwise provided in this title and except that the obligations of good faith, diligence, reasonableness and care prescribed by this title may not be disclaimed by agreement, but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable."

SDCL 57-1-13 (UCC §1-203) provides:

"57-1-13. Obligation of Good Faith.—Every contract or duty within this title imposes an obligation of good faith in its performance or enforcement."

"Good faith" is defined in SDCL 57-1-2 (19) (UCC §1-201) as follows:

"(19) 'Good faith' means hc sty in fact in the conduct or transaction concerned."

Honesty placed a duty upon Dresser to insert a paragraph in its typewritten specifications if it so intended, spelling out that by specifying a design load of 60 psf, it did not warrant or represent that the tower after erection would withstand a wind load of 120 miles per hour; and further, that the destruction of the antenna placed at the top of the tower and the buildings at the foot of the tower in the event that the tower collapsed would be at the sole risk of Plaintiff following erection of the tower by Dresser and its acceptance by Plaintiff. It is manifest that Dresser should not be permitted to create an expressed warranty in one breath and surreptitiously disclaim in another.

IV.

THE PROVISIONS OF ITEM 9 PROVIDING FOR THE LIMITED REMEDY OF THE PLAINTIFF AND LIMITED DAMAGES IN THE EVENT OF BREACH OF WARRANTY WERE UNCONSCIONABLE.

SDCL 57-4-2 (UCC §2-302) provides:

"57-4-2. *Unconscionable Contract or Clause.—Finding by Court as a Matter of Law, Effect.*—If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."

The warranty as printed in item 9 on the back of the contract severely limited the remedies of the Buyer. Not only did it provide an unconscionably short warranty period; moreoever it limited the Buyer to remedies of the repair, replacement, or refund of an equitable portion of the purchase price (this to be at the Seller's sole option) of any product or work which the *Seller* determines to have been defective or failed to meet applicable specifications. Note that this did not give the Buyer the option to state whether it wanted the tower repaired or replaced, or whether it wanted a refund of the purchase price, but left that determination to the Seller's sole option, and then only if the Seller determined its product or work to have been defective, or to have failed to meet specifications. When the tower collapsed on January 11, 1975, Dresser was no longer in the tower business. It could not have repaired or replaced the tower. Community Television Services was still in business. Stations KELO TV and KSFY TV stood to lose great sums of money until they got back on the air. They were forced to replace the tower by dealing with tower companies which were still in business. The Plaintiff could not wait for the Defendant to announce its option. And when the Plaintiff did immediately notify the Defendant of the collapse of the tower, the response it received, according to the evidence, was, "Well, it looks like another lawsuit."

Doubtless the unconscionability provisions of the Uniform Commercial Code had their genesis in decisions such as *Henningsen v. Bloomfield Motors*, 32 N.J. 358, 161 A. 2d 69, 75 ALR 2d 1 (1960). Regarding the unsatisfactory remedy the New Jersey court said: (quoting from 75 ALR 2d at 15 and 16):

"The manufacturer agrees to replace defective parts for 90 days after the sale or until the car has been driven 4,000 miles, whichever is first to occur, *if the part is sent to the factory, transportation charges prepaid, and if examination discloses to its satisfaction that the part is defective.* It is difficult to imagine a greater burden on the consumer, or less satisfactory remedy. Aside from imposing on the buyer the trouble of removing and shipping the part, the maker has sought to retain the uncontrolled discretion to decide the issue of defectiveness. Some courts have removed much of the force of that reservation by declaring that the purchaser is not bound by the manufacturer's decision. *Mills* v. *Maxwell Motor Sales Corporation*, 105 Neb. 465, 181 N.W. 152, 22 ALR 130 (Sup. Ct. 1920); *Cannon* v. *Pulliam Motor Company*, 230 SC 131, 94 Sup Ct. 1956). In the *Mills* case, the court said:

> 'It would nevertheless be repugnant to every conception of justice to hold that, if the parts thus returned for examination were, in point of fact, so defective as to constitute a breach of warranty, the appellee's right of action could be defeated by the appellant's arbitrary refusal to recognize that fact. Such an interpretation would substitute the appellant for the courts in passing upon the question of fact, and would be unreasonable.' Supra. 181 NW at page 154.

"Also suppose, as in this case, a defective part or parts caused an accident and that the car was so damaged as to render it impossible to discover the

precise part or parts responsible, although the circumstances clearly pointed to such fact as the cause of the mishap. Can it be said that the impossibility of performance deprived the buyer of the benefit of the warranty?

"Moreover, the guaranty is against defective workmanship. That condition may arise from good parts improperly assembled. There being no defective parts to return to the maker, is all remedy to be denied?

Later in the *Henningsen* decision (at 75 ALR 2d 22), the Court asks the question, "But does the doctrine that a person is bound by his signed agreement, in the absence of fraud, stand in the way of any relief?" The Court says:

"In the modern consideration of problems such as this, Corbin suggests that practically all judges are 'chancellors' and cannot fail to be influenced by any equitable doctrines that are available. And he opines that 'there is sufficient flexibility in the concepts of fraud, duress, misrepresentation and undue influence, not to mention differences in economic bargaining power' to enable the courts to avoid enforcement of unconscionable provisions in long printed standardized contracts. 1 Corbin on Contracts (1950) §128, p. 188. Freedom of contract is not such an immutable doctrine as to admit of no qualification in the area in which we are concerned. As Chief Justice Hughes said in his dissent in Morehead v. People of State of New York ex rel. Tipaldo, 298 U.S. 587, 627, 56 S. Ct. 918, 930, 80 L. Ed. 1347, 1364 (1936):

'We have had frequent occasion to consider the limitations on liberty of contract. While it is highly important to preserve that liberty from arbitrary and capricious interference, it is also necessary to prevent its abuse, as otherwise it could be used to override all public interests and thus in the end destroy the very freedom of opportunity which it is designed to safeguard.' "

Long before the promulgation of the Uniform Commercial Code Courts held as a matter of common law that unconscionable contracts were not enforceable. In *Williams* v. *Walker-Thomas Furniture Company*, 121 App. D.C. 315, 350 F. 2d 445, 18 ALR 3d 1297 (1965), the Court of Appeals for the District of Columbia said:

"We do not agree that the court lacked the power to refuse enforcement to contracts found to be unconscionable. In other jurisdictions, it has been held as a matter of common law that unconscionable contracts are not enforceable. While no decision of this court so holding has been found, the notion that an unconscionable bargain should not be given full enforcement is by no means novel. In Scott v. United States, 79 U.S. (12 Wall) 443, 445, 20 L. Ed. 438, 439 (1870), the Supreme Court stated:

'. . . If a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give to the party who sues for its breach damages, not according to its letter, but only such as he is equitably entitled to. . . .'

"Since we have never adopted or rejected such a rule, the question here presented is actually one of first impression."

The contracts in that case were made prior to the adoption of the Uniform Commercial Code in the District of Columbia.

In *C & J Fertilizer, Inc.* v. *Allied Mutual Insurance Co.* —Iowa —, 227 N.W. 2d 169 (1975), the Iowa Court relied on the tentative draft of the Restatement (Second) of Contracts:

"The rule of selective elimination of unconscionable provisions is articulated in the tentative draft of the Restatement (Second) of Contracts, supra §284, p. 528:

'§234. Unconscionable Contract or Term.

'If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.' " (227 N.W. 2d at 180)

In *Wilson Trading Corporation* v. *David Ferguson, Ltd.*, 23 N.Y. 2d 398, 244 N.E. 2d 685 (1968), the sales contract between the two companies created an unlimited express warranty of merchantability, but in a separate clause (much as in the case at bar) reportedly modified the warranty by imposing a time limitation in which the seller would be liable for a warranty breach. Referring to

several provisions of the Uniform Commercial Code, the Court of Appeals of New York observed that contractual limitations upon remedies are generally to be enforced *unless unconscionable*. The court referred to several provisions of the Uniform Commercial Code in the following discussion, at 244 N.E. 2d 687:

"Parties to a contract are given broad latitude within which to fashion their own remedies for breach of contract (Uniform Commercial, §2-316, subd. [4] §§2-718-2-719). Nevertheless, it is clear from the official comments to section 2-719 of the Uniform Commercial Code that it is the very essence of a sales contract that at least minimum adequate remedies be available for its breach. 'If the parties intend to conclude a contract for sale within this Article they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract. Thus any clause purporting to modify or limit the remedial provisions of this Article in an *unconscionable manner* is subject to deletion and in that event the remedies made available by this Article are applicable as if the stricken clause had never existed.' " (Uniform Commercial Code, §2-719, official comment 1; emphasis supplied.)

Later, at 244 N.E. 2d 689, the Court said:

"Here, the contract expressly creates an unlimited express warranty of merchantability while in a separate clause purports to indirectly modify the warranty without expressly mentioning the word merchantability. Under these circumstances, the lan-

guage creating the unlimited express warranty must prevail over the time limitation insofar as the latter modifies the warranty. It follows that the express warranty of merchantability includes latent shading defects and defendant may claim for such defects not reasonably discoverable within the time limits established by the contract if plaintiff was notified of these defects within a reasonable time after they were or should have been discovered."

Steele v. *J. I. Case Company*, 197 Kan 554, 419 P. 2d 902 (1966) involves a factual situation quite parallel to the instant case. The *J. I. Case* warranty provided that liability of the manufacturer of farm machinery for any breach thereof was limited to a return of the purchase price of the product or defective part thereof. The court held that this provision would not be given effect where, among other things, the manufacturer knew that the combines were purchased for use in the harvest and must be deemed to have known the urgency of the harvest on the High Plains and the danger consequent upon any stoppage in operations after the grain had ripened and was to be cut. The court discussed cases such as the *Henningsen* and other legal writings pointing out the inequities which may result from rigid enforcement of the disclaimer and limiting clauses so prevalent in commercial sales agreements and referred to the fact that there is often wide disparity in the bargaining positions of seller and purchaser. The court concluded that it would be unjust to enforce the limitation set out in the *J. I. Case* contract.

For further similar discussion of unconscionability of

contract provisions, see *American Home Improvement* v. *MacIver*, 105 N.H. 435, 201 A. 2d 886, 14 ALR 3d 324 (1964); *Campbell Soup Company* v. *Wentz*, 172 F. 2d 80, (3d Cir. 1948); *McCarty* v. E. J. Corvette, Inc., 28 Md. App. 421, 347 A. 2d 253 (1975).

V.

THE ATTEMPTED EXCLUSION OF CONSEQUENTIAL DAMAGES TO THE ANTENNA AND BUILDINGS WAS UNCONSCIONABLE.

SDCL 57-8-51 (UCC §2-719) provides:

"57-8-51. *Consequential Damages—Limiting or Excluding.*—Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not."

Consequential damages are defined in SDCL 57-8-40 (UCC §2-715):

"57-8-40. *Consequential Damages from Seller's Breach, Items Included.*—Consequential damages resulting from the seller's breach include

(1) Any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(2) Injury to person or property proximately resulting from any breach of warranty."

At the time of entering into the contract, the Defendant knew that the Plaintiff had no use for the bare tower. The sole purpose of the tower was to support antennas and associated equipment which were to be used for transmitting television and FM signals. The equipment to be carried on the tower was listed in the specifications of the contract. In the event of the collapse of a 2,000 foot tower the Defendant certainly knew that the antenna at the top would be demolished, and it could certainly anticipate that buildings at the foot of the tower might be badly damaged. A warranty which only provided for the repair, replacement or refund of the purchase price of such part of the tower as the Defendant should determine to have been defective, and this at the Defendant's sole option, would leave the Plaintiff with no remedy at all for equipment which the Defendant knew was very costly. What could be more unconscionable than for a seller to give an explicit warranty in typewriting tailor made to the contract that a tower shall be designed to resist a wind load of 60 psf. knowing that the tower's only use would be to support an antenna and other equipment, with necessary buildings at the foot of the tower, and then bury in fine print on the backside of the contract a limitation which excludes any responsibility for destruction of the antenna, other equipment and buildings in a collapse of the tower caused by its failure to meet the explicit warranty in the specifications?

Whether such a limitation of damages is unconscionable in a particular contract is expressly made a question of law for determination by the court. This is provided for by SDCL 57-4-2 (UCC §2-302):

> "If the *court as a matter of law finds* the contract or any clause of the contract to have been unconscionable at the time it was made the *court* may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." (Emphasis supplied)

The court properly made this finding in this case before submitting the matter of the express warranty to the jury. *County Asphalt, Inc.* v. *Lewis Welding and Engineering Corporation,* 444 F. 2d 372 (2d Cir. 1971). See also *S-C Industries* v. *American Hydroponics System, Inc.,* 468 F. 2d 852 (5th Cir. 1972).

VI.

THE CIRCUMSTANCES OF THIS CASE CAUSED THE EXCLUSIVE OR LIMITED REMEDY OF ITEM 9 TO FAIL OF ITS ESSENTIAL PURPOSE.

SDCL 57-8-50 (UCC §2-719) provides:

> "57-8-50. *Failure of Exclusive or Limited Remedy, Effect.*—Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this title."

The South Dakota Supreme Court applied this UCC Section in *Ehlers* v. *Chrysler Motor Corporation,* — S.D. —, 226 N.W. 2d 157, 160 (1975), saying: "Chrysler may not rely on its disclaimer because the breach has caused the limited remedy to 'fail of its essential purpose'."

Dresser's warranty might have been sufficient if, for instance, inspection during the first six months had revealed a defective member in the tower which had not yet caused the tower to collapse and which could readily have been replaced. But in the circumstances of a complete collapse of the tower when it did not withstand a wind load of considerably less than 60 pounds per square foot, the warranty certainly failed of its essential purpose. In *Ehlers*, the South Dakota court quoted *White* and *Summers*' reference to UCC §2-719(2), the parallel provision to SDCL 57-8-50:

> "This provision "is not concerned with arrangements which were oppressive at their inception, but rather with the application of an agreement to novel circumstances not contemplated by the parties'."

The court went on to say:

> "Thus what was once fair, but due to novel circumstances is no longer, is the purview of this statute. As stated in the Official Comment to UCC 2-719(2) (SDCL 57-8-50):
>
> > '. . . where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Article.' "

There is no evidence in the instant case that Dresser offered to do anything when notified of the collapse of the tower. Its only response was, "Well, it looks like another lawsuit." The following further quotation from the South Dakota court in *Ehlers* is appropriate:

> "It is impermissible for appellant to choose which sections of the warranty to be bound by. Appellant Chrysler's actions in breaching the warranty by refusing to honor its obligations under it has caused the limited remedy of repair and replacement 'to fail of its essential purpose'. It necessarily follows that plaintiff-respondent is entitled to seek damages for incidental and consequential losses caused by appellant's breach."

See also the following from *Eckstein* v. *Cummins*, 41 Ohio App. 2d 1, 321 N.E. 2d 897, 904 (1974):

> "To place the purchaser of a defective vehicle incapable of repair in the anomalous position of having no actionable claim for relief pursuant to the strict language of the express warranty and disclaimer therein, because the precise nature of the defect cannot be determined and the plaintiff cannot identify any defective part, the replacement of which could remedy the defect, would be to defeat the very purpose of the warranty which had been given to the purchaser. Such a result would substantially deprive the buyer of the benefit of his bargain and is unconscionable. Although the warranty and disclaimer, which is strictly limited to parts, is not unconscionable on its face, it cannot be applied to the facts of this unique case in a conscionable manner. Otherwise, there would be non-compliance with R.C. 1302.15 and 1302.93(B). *Meyer* v. *Packer Cleveland Motor Co.* (1922), 106 Ohio St. 328, 140 N.E. 118; *Henningsen* v. *Bloomfield Motors* (1960), 32 N.J. 358, 161 A. 2d 69; *Hardy* v. *General Motors Acceptance Corp.* (1928), 38 Ga. App. 463, 144

S.E. 327; cf. *Manheim* v. *Ford Motor Co.* (Fla. 1967), 201 So. 2d 440; *Walsh* v. *Ford Motor Co.* (1969), 59 Misc. 2d 241, 298 N.Y.S. 2d 538; *Jacobs* v. *Metro Chrysler-Plymouth, Inc.* (1972), 125 Ga. App. 462, 188 S.E. 2d 250; *Greeno* v. *Clark Equipment Co.* (N.D. Ind. 1965), 327 F. Supp. 427.

"R.C. 1302.29, casts the burden upon the seller to prove a disclaimer of warranties. Where as here, the seller was unable to cure the defect in plaintiff's automobile, the express warranty, and its disclaimer which provided for a contractual modification and limitation of the rights and remedies of the buyer failed of its essential purpose and the 'circumstances cause[d] an exclusive or limited remedy to fail of its essential purpose' within the meaning of R.C. 1302.93(B), and cannot be deemed the exclusive remedy. Comment 1, R.C. 1302.26."

The Ohio court also said, at 321 N.E. 2d 906:

"The fundamental purpose of the warranty provisions of the Uniform Commercial Code is to prevent surprise resulting from unexpected and unbargained for disclaimers of express or implied warranties. Comment 1, R.C. 1302.29."

SDCL 57-8-38 (UCC §2-714) provides:

"57-8-38. *Buyer's Damages for Breach in Regard to Accepted Goods—Incidental and Consequential Damages.*—In a proper case any incidental and consequential damages under §§57-8-39 and 57-8-40 may also be recovered."

SDCL 57-8-40 (UCC §2-715) was quoted in the previous division of this brief. We do not find that the South Dakota Supreme Court has specifically construed this last section, although *Swenson* v. *Chevron Chemical Company*, — S.D. —, 234 N.W. 2d 38 (1975) is annotated under that section in the current pocket supplement to the South Dakota Code. The section was before the Court of Appeals for the Eighth Circuit in a case arising out of South Dakota, however, *Karlen* v. *Butler Manufacturing Company*, 526 F. 2d 1373 (8th Cir. 1975). The Court of Appeals there said:

"This section of the Uniform Commercial Code had its origin in the teachings of *Hadley* v. *Baxendale*, 9 Exch. 341 (1854), one court going so far as to hold that §2-715 of the code 'in substance . . . codifies the rule enunciated in *Hadley* v. *Baxendale*.' The official comment to this portion of the code makes clear the intent of the draftsmen thereof."

Then in a footnote, the court says:

"11. 2. Subsection (2) operates to allow the buyer, in an appropriate case, any consequential damages which are the result of the seller's breach. The 'tacit agreement' test for the recovery of consequential damages is rejected. Although the older rule at common law which made the seller liable for all consequential damages of which he had 'reason to know' in advance is followed, the liberality of that rule is modified by refusing to permit recovery unless the buyer could not reasonably have prevented the loss by cover or otherwise. Sub-paragraph (2) car-

ries forward the provisions of the prior uniform statutory provision as to consequential damages resulting from breach of warranty, but modifies the rule by requiring first that the buyer attempt to minimize his damages in good faith, either by cover or otherwise."

Applying the "reason to know" rule enunciated in the comment, in the instant case the Defendant certainly had reason to know the use the Plaintiff intended to make of the tower.

To the same effect, see *Beal* v. *General Motors Corporation*, 354 F. Supp. 423 (D.C. Del 1973) at p. 428:

> "Based upon the 'had reason to know' language of §2-715(2) and the Official Comment to that section by its draftsmen, I believe that the Supreme Court of Delaware, if confronted with this question, would adopt the test of the *Adams* case. Under that test, the question then is whether the loss for which recovery is sought is one that results from general or particular requirements or needs of which the seller at the time of contracting had reason to know. If it is, then consequential damages are proper provided that those damages could not have been reasonably prevented by action of the buyer."

VII.

THE ATTEMPTED LIMITATION OF THE EFFECTIVE PERIOD OF THE WARRANTY TO SIX MONTHS AFTER PLAINTIFF'S ACCEPTANCE OF THE TOWER CANNOT BE ENFORCED WHERE THE WARRANTY AS TO RESISTING A WIND LOAD OF 60 PSF EXTENDED TO FUTURE PERFORMANCE OF THE TOWER AND DISCOVERY OF THE BREACH NECESSARILY AWAITED THE TIME OF SUCH PERFORMANCE.

SDCL 57-8-62 (UCC §2-725) provides:

> "57-8-62. *Accrual of Cause of Action for Breach.*—A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered."

S-C Industries v. *American Hydroponics System, Inc.*, 468 F. 2d 852 (5th Cir. 1972) carried out the provisions of this section of the Uniform Commercial Code.

VIII.

THE ATTEMPTED REDUCTION OF THE PERIOD OF LIMITATION OF TIME FOR BRINGING A WARRANTY CLAIM TO SIX MONTHS AFTER BREACH DID NOT COMPLY WITH THE SOUTH DAKOTA STATUTE.

SDCL 57-8-61 (UCC §2-725) provides:

> "57-8-61. *Limitation of Actions for Breach of Contract.* An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it."

Item 9 of the printed contract seems to attempt to reduce the time for bringing a warranty claim to half the minimum time which the statute allows. In any event, the Plaintiff commenced this action within the one year allowed by the statute.

IX.

INSOFAR AS THE CONTRACT ATTEMPTED TO FIX THE AMOUNT OF DAMAGE OR COMPENSATION FOR BREACH IN ANTICIPATION OF SUCH BREACH, IT WAS VOID UNDER THE STATUTE.

SDCL 53-9-5 provides:

> "53-9-5. *Contracts Fixing Damages Void, Exception.*—Every contract in which amount of damages or compensation for breach of an obligation is determined in anticipation thereof is void to that extent except the parties may agree therein upon an amount presumed to be the damage for breach in cases where it would be impracticable or extremely difficult to fix actual damage."

The South Dakota Supreme Court has held, in *Anderson* v. *Cactus Heights Country Club*, 80 S.D. 417, 125 N.W. 2d 491 (1963), that a stipulation in a contract for liquidated damages is void unless it is shown that the case comes within the statutory exception. The exception is stated in that opinion as follows:

> "A provision for payment of a stipulated sum as a liquidation of damages will ordinarily be sustained if it appears that at the time the contract was made the damages in the event of a breach will be incapable or very difficult of accurate estimation, that there was a reasonable endeavor by the parties as stated to fix fair compensation, and that the amount stipulated bears a reasonable relation to probable damages and not disproportionate to any damages reasonably to be anticipated."

The opinion in the *Anderson* case sets forth the contract in full, shows that in the contract the parties did make a reasonable endeavor to fix their compensation, referred to it as liquidated damages, and the court found that the amount stipulated did bear a reasonable relation to probable damages and not disproportionate to any damages reasonably to be anticipated.

In the instant case, the provision is not for liquidated damages as such; it is not impracticable or extremely dif-

ficult to fix the actual damages; there is no showing of a reasonable endeavor by the parties to fix fair compensation in the event of a breach; and a mere refund of an equitable portion of the purchase price is not proportionate to the damages reasonably to be anticipated.

X.

THE DEFENDANT'S CONSTRUCTION OF WORDS IN ITEM 9 TENDING TO NEGATE OR LIMIT THE EXPRESS AND EXPLICIT WARRANTY IS INOPERATIVE.

SDCL 57-4-34 (UCC §2-316(1) provides:

> "57-4-34. *Construction of Words or Conduct Tending to Negate or Limit Express Warranty Inoperative.*—Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of chapter 57-3 on parol or extrinsic evidence (§57-3-4) negation or limitation is inoperative to the extent that such construction is unreasonable."

Berk v. *Gordon Johnson Company*, 232 F. Supp. 682 (D.C. Mich. 1964) carries out the intent of this section. The case arose out of a contract for the purchase by a kosher poultry market of certain automated equipment for the production of kosher poultry. The action was brought against the seller for breach of warranty. The order blank contained the usual limited warranty and exclusion of any warranty on the reverse side, but a drawing showing how

the appropriate equipment would fit into the plaintiff's poultry plant contained the words in writing on the lower right-hand corner: "Kosher operation". Apparently the equipment did not satisfy kosher requirements and the plaintiff sued, claiming that the written words "Kosher operation" constituted an express warranty. The court agreed. After quoting UCC §2-316(1) the court said (at 232 F. Supp. 688):

> "In accord with the Uniform Commercial Code that language of disclaimer of warranty should not be favored is a note, 'Warranties, Disclaimers and the Parol Evidence Rule,' in 53 Columbia Law Review 858 (1953). This note reads, at page 868: 'Although in theory disclaimers can be executed which give the seller absolute protection, in practice the courts have evidenced their distaste for disclaimers by narrowly construing them. They have constantly seized upon any possible loophole in the language to find that it did not bar all warranties . . . The tendency to construe disclaimers strictly is probably due to a commendable judicial feeling that, whenever possible, a court should enable the buyer to obtain something for his money.
>
> "In light of the absence of case law favoring disclaimers over express warranties, the effect of conventional rules of construction in the instant case favoring the claimed warranty over the disclaimer if the clauses are inconsistent, and the recommendations of the Uniform Commercial Code as to conflicts of warranties and disclaimers, this Court holds that if the words 'Kosher operation' are assumed to be an ex-

press warranty in the contract, the language of disclaimer cannot be said as a matter of law to negative that warranty. Therefore, the defendant's motion for summary judgment on the breach of warranty count of the plaintiffs' complaint must be denied. An appropriate order may be submitted."

In a suit upon an insurance contract, the South Dakota Supreme Court scorned inconsistent provisions of an insurance policy, which offer a parallel to the inconsistency in the Dresser contract with the comment: "The front page giveth, but the back page taketh away." *Farmers Mutual Automobile Insurance Company* v. *Beshard*, 80 S.D. 237, 122 N.W. 2d 86, 87 (1963).

SDCL 57-4-34 (UCC §2-316(1)) is a logical extension of well established common law rules of contract construction. As stated in 17 AmJur 2d Contracts §271, p. 679:

"The rule is well settled that where part of a contract is written or typed and part is printed, and the written or typed and the printed parts are apparently inconsistent or there is reasonable doubt as to the sense and meaning of the whole, the words in writing or typing will control. The reason greater effect is given to the written or typed part of an agreement than to the printed part of it, if they are inconsistent, is that the written or typed words are the immediate language and terms selected by the parties themselves for the expression of their meaning, while the printed form is intended for general use without reference to particular objects and aims."

White and Summers, at page 353 of their work state:

"A conflict between express warranties and disclaimer language may also develop when an express warranty is handwritten or typed on a printed form. For example, one Pennsylvania case involved a contract to convert a heating system from steam to hot water and to replace component parts. A printed provision disclaimed all liability on the seller's part for damage to person or property, but a typed-in provision stated, 'This installation shall be done in a neat and workmanship like [sic] manner and guaranteed for one year.' The court held that under these circumstances the warranty would not be defeated by the printed disclaimer unless such an intention were spelled out clearly and certainly.

"We hope courts will reach similar conclusions and strike down attempted disclaimers in cases in which the seller includes a description of the article which amounts to a warranty and then attempts to disclaim all express warranties. Assume, for example, that the sales contract described machinery to be sold as a 'haybaler' and then attempts to disclaim all express warranties. If the machine fai'ed to bale hay and buyer sued, we would argue that the disclaimer is ineffective. In our judgment, the description of the machine as a 'haybaler' is a warranty that the machine will bale hay and, in the words of 2-316, a negation or limitation ought to be 'inoperative' since it is inconsistent with the warranty."

In *Wilson Trading Corporation* v. *David Ferguson, Ltd.*, 23 N.Y. 2d 398, 244 N.E. 2d 685, 689 (1968) the

Court of Appeals of New York states: "Section 2-316 (subd. [1]) of the Uniform Commercial Code provides that warranty language prevails over the disclaimer if the two cannot be reasonably reconciled."

The courts have often avoided the enforcement of unconscionable provisions in long printed standardized contracts. *American Home Improvement* v. *MacIver*, 105 N.H. 435, 201 A. 2d 886, 14 ALR 3rd 324, 328 (1964); *Henningsen* v. *Bloomfield Motors*, 32 N.J. 358, 161 A. 2d 69, 75 ALR2d 1, 22.

The Iowa court dealt harshly with a standardized contract which would defeat the reasonable expectations of the average party who accepted it, in *C & J Fertilizer, Inc.* v. *Allied Mutual Insurance Company*, — Iowa —, 227 N.W. 2d 169 (1975). At 227 N.W. 2d 172 the court quoted the Restatement (Second) of Contracts, §237 Comment e, p. 540:

> "Courts in construing and applying a standardized contract seek to effectuate the reasonable expectations of the average member of the public who accepts it."

At 227 N.W. 2d 173, the Iowa court quoted this from W. Slawson, Standard Form Contracts and Democratic Control of Lawmaking Power, 84 Harvard Law Review 529 (1971):

> "I. *Revolution in Formation of Contractual Relationships.*
>
> "Many of our principles for resolving conflicts relating to written contracts were formulated at an early time when parties of equal strength negotiated in the historical sequence of offer, acceptance, and reduction to writing. The concept that both parties assented to the resulting document had solid footing in fact.

> "Only recently has the sweeping change in the inception of the document received widespread recognition:
>
> > 'Standard form contracts probably account for more than ninety-nine percent of all contracts now made. Most persons have difficulty remembering the last time they contracted other than by standard form; except for casual oral agreements, they probably never have. But if they are active, they contract by standard form several times a day. Parking lot and theater tickets, package receipts, department store charge slips, and gas station credit card purchase slips are all standard form contracts.
> >
> > . . . . .
> >
> > '. . . The contracting still imagined by courts and law teachers as typical, in which both parties participate in choosing the language of their entire agreement, is no longer of much more than historical importance.' "

At 227 N.W. 2d 175, the court said:

> "The mass-produced boiler-plate 'contracts,' necessitated and spawned by the explosive growth of complex business transactions in a burgeoning population left courts frequently frustrated in attempting to arrive at just results by applying many of the tradi-

tional contract-construing stratagems. As long as fifteen years ago Professor Llewellyn, reflecting on this situation in his book 'The Common Law Tradition-Deciding Appeals,' pp. 362-71 wrote,

> 'What the story shows thus far is first, scholars persistently off-base while judges grope over well-nigh a century in irregular but dogged fashion for escape from a recurring discomfort of imbalance that rests on what is in fact substantial nonagreement despite perfect semblance of agreement. (pp. 367-368).
>
> '. . .
>
> 'The answer, I suggest, is this: Instead of thinking about 'assent' to boilerplate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms. The fine print which has not been read has no business to cut under the reasonable meaning of those dickered terms which constitute the dominant and only real expression of agreement, but much of it commonly belongs in.' (p. 370)."

At 227 N.W. 2d 176, the court quoted the analysis of the "reasonable expectations doctrine" from Comment f to

§237 of Restatement (Second) of Contracts, pp. 540 and 541:

> 'Although customers typically adhere to standardized agreements and are bound by them without even appearing to know the standard terms in detail, they are not bound to unknown terms which are beyond the range of reasonable expectation. A debtor who delivers a check to his creditor with the amount blank does not authorize the insertion of an infinite figure. Similarly, a party who adheres to the other party's standard terms does not assent to a term if the other party has reason to believe that the adhering party would not have accepted the agreement if he had known that the agreement contained the particular term. Such a belief or assumption may be shown by the prior negotiations or inferred from the circumstances. Reason to believe may be inferred from the fact that the term is bizarre or oppressive, from the fact that it eviscerates the non-standard terms explicitly agreed to, or from the fact that it eliminates the dominant purpose of the transaction. The inference is reinforced if the adhering party never had an opportunity to read the term, or if it is illegible or otherwise hidden from view. This rule is closely related to the policy against unconscionable terms and the rule of interpretation against the draftsman.'

XI.

THE DAMAGES WERE CORRECTLY ASSESSED

SDCL 57-8-37 (UCC §2-714(2)) provides:

> "57-8-37. *Remedies of Buyer—Damages for Breach of Warranty.*—The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount."

The Defendant argues that the Plaintiff's measure of damages in this case is strictly limited as stated in the first clause of the above section. Doubtless there are many instances where it would be fair to measure damages for breach of warranty by the difference between the value of the goods accepted, and the value they would have had if they had been as warranted, particularly in the case of fungible goods or strictly personal property. That measure is obviously not a fair measure of the Plaintiff's damages in this case, where the Plaintiff lost not only the tower covered by the contract with the Defendant, but also antennas, equipment and buildings. This is just such a case as is contemplated in the last clause of the statute, which covers a case where special circumstances show proximate damages of a different amount.

There was good South Dakota authority for measuring the damages by the replacement value of the tower, antenna and buildings, less depreciation the old tower, antenna, equipment and buildings had suffered through use. This measure of damages was approved in *Metropolitan Life*

Insurance Company v. *Farmers Cooperative Company*, 68 S.D. 338, 2 N.W. 2d 665 (1942) where the defendants had entered upon the plaintiff's property and had taken down and removed a fence. The South Dakota court there dismissed the defendant's contention that the measure of the damages was the difference in value of the real estate before and after its injury. Conceding that the general rule had been enunciated as claimed by the defendant, the court said that it did not believe any such rule should be applied to the facts of that case. The court said:

> "We are here concerned with the destruction of a wire fence which may be replaced at will, and the value of which may be readily determined apart from the real estate. We think the sound measure of damages for the destruction of property of the nature of that here involved is its value as it stands on the real estate, which may be ascertained by determining the cost of constructing a similar fence or structure and deducting therefrom the depreciation the old one had suffered by reason of age and use."

This same point came before the Court of Appeals for the Eighth Circuit in a South Dakota case, in *Big Rock Mountain Corporation* v. *Stearns-Roger Corporation*, 388 F. 2d 165 (1968). *Big Rock* had brought an action against *Stearns-Roger* for breach of express and implied warranties of fitness and negligence in the construction of an aluminum stem which supported a gondola for carrying passengers. There it was the plaintiff who contended that the sole proper measure of damages resulting from the failure of the stem was the before and after value of the

property. The Court of Appeals quoted from *Metropolitan Life* v. *Farmers Cooperative* as we have quoted above.

It is to be noted that the court specifically started with the costs of constructing a similar structure, and deducting therefrom the depreciation *the old one* had suffered by reason of age and use. The Court of Appeals continued with the statement:

> "Where there is more than one method of estimating damages, that method which is most definite and certain shall be adopted."

The most definite and certain method of measuring the Plaintiff's damages in this case was the cost of replacing the tower, antenna, equipment and buildings, less, of course, the depreciation the old ones had sustained. This results in compensating the Plaintiff for the value of his loss, and no more. Of course, it would have been open to the Defendant to attempt to show that the diminution in market value of the property was less than the reasonable cost of replacement, but the Defendant offered no such evidence.

The South Dakota Supreme Court most recently approved the replacement cost less depreciation measure of damages in a case not yet published in the Northwestern Advance Sheets, but circulated in mimeographed form to the bench and bar of South Dakota. This is the case of *Robert J. Shaffer, First National Bank of Aberdeen, Executor of the Estate of Jane Ann Shaffer, Deceased, St. Paul Fire & Marine Insurance Company, a Corporation and Western Fire Insurance Company, a Corporation*, v. *Honeywell, Inc., a Corporation and A. J. Industries, Inc., a Corporation, Roberts-Gordon Appliance Corporation,*

Dunkirk Radiator Corporation, and Northwestern Public Service Company. In that case *Honeywell* attacked the measure of damages permitted by the trial court, contending that the award could not exceed the fair market value of the property at the time it was destroyed. The Supreme Court determined that the trial court did not err in using the acquisition costs or replacement costs, adjusted by depreciation. The court said:

> "There can be no doubt that second-hand market value is not adequate compensation for a person who suffers the destruction of his personal property. Likewise, to permit full replacement value would be to allow more than the actual value of the goods destroyed. We find that the trial court reached a reasonable measure of damages in utilizing original cost or replacement cost adjusted by a percentage for depreciation varying with the age and condition of the property. See *Marsh* v. *Union Pacific Ry. Co.*, 1882, C.C. Colo., 9 Fed. 873; *Rafal* v. *Rafal*, 1964, Del., 198 A. 2d 177; *Gray* v. *Security Storage & Van Co.*, 1946, La., 26 So. 2d 399."

CONCLUSION

The Defendant made an explicit and specific warranty when it stated:

> "The tower shall be designed to resist a uniform wind load per drawing T-5172, Sheet S-1, 60 psf on flats."

The disclaimer in the printed form is ineffective to negate or modify that warranty. Only time could tell wheth-

er the warranty was true. When the tower failed there was a breach of this express, specific warranty. To allow the Defendant to escape liability on the basis of its purported disclaimer would deprive the Plaintiff of its bargain.

Respectfully submitted,

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CERTIFICATE OF SERVICE

DEMING SMITH, one of the attorneys for the Plaintiff, hereby certifies that a true copy of the foregoing "Plaintiff's Post Trial Brief" was served by mail on Mr. Harold Doyle, 412 West Ninth Street, Sioux Falls, South Dakota, and Mr. G. Alan Cunningham, 1300 Northwestern Bank Building, Minneapolis, Minnesota, attorneys for the Defendant, this 20th day of January, 1977.

/s/ DEMING SMITH

IN THE

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. CIV 75-4056
CIVIL

COMMUNITY TELEVISION SERVICES, INC.,
Plaintiff-Appellee,

vs.

DRESSER INDUSTRIES, INC.,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
DISTRICT OF SOUTH DAKOTA, SOUTHERN DIVISION,
HON. FRED J. NICHOL, JUDGE

APPELLANT'S BRIEF

STATEMENT OF ISSUES

I. Whether the trial court erred when it declared unenforceable and excised the six-month warranty of future performance in the parties' sales contract.

Beckmire v. Ristokrat Clay Prod. Co., 36 Ill. App. 3d, 343 N.E. 2d 530 (1976).

Binkley Co. v. Teledyne Mid-America Corp., 333 F. Supp. 1183 (E.D.Mo. 1971) *aff'd* 460 F.2d 276 (8th Cir. 1972).

Raymond-Dravo-Langenfelder v. Microdot, Inc., 425 F. Supp. 614 (D.C. Del. 1977).

II. Whether the trial court erred when it failed to enforce the provision of the parties' sales contract which limited seller's liability to defects discovered within six months after the tower's completion. Application of that provision would have precluded this claim, since the alleged defect was discovered almost six years after the tower's completion.

Am. Elec. Power Co., Inc. v. Westinghouse Elec. Corp., 418 F.Supp. 435 (S.D.N.Y. 1976).

Architectural Aluminum Corp. v. Macarr, Inc., 70 Misc. 2d 495, 333 N.Y.S. 2d 818 (1972).

Boone Valley Coop. Processing Ass'n. v. French Oil Mill Mach. Co., 383 F. Supp. 606 (N.D. Ia. 1974).

County Asphalt, Inc. v. Lewis Welding & Eng'r. Corp., 323 F. Supp. 1300 (S.D.N.Y. 1970), *cert. denied*, 404 U.S. 939 (1971).

Cyclops Corp. v. Home Ins. Co., 389 F. Supp. 476 (W.D. Pa. 1975), *aff'd* 523 F.2d 1050 (3d Cir. 1975).

Fredonia Broadcasting Corp., Inc. v. RCA Corp., 481 F. 2d 781 (5th Cir. 1973).

Neville Chem. Co. v. Union Carbide Corp., 294 F. Supp. 649 (W.D. Pa. 1968) aff'd in part and rev'd in part, 422 F. 2d 1205 (3d Cir.), *cert. denied*, 400 U.S. 826 (1970).

Potomac Elec. Power Co. v. Westinghouse Elec. Corp., 385 F.Supp. 572 (D.D.C. 1974), *rev'd* on other grounds, 527 F.2d 853 (D.C. Cir. 1975).

Royal Indem. Co. v. Westinghouse Elec. Corp., 385 F. Supp. 520 (S.D. N.Y. 1974).

Southwest Forest Indus., Inc. v. Westinghouse Elec. Corp., 422 F.2d 1013 (9th Cir.), *cert. denied*, 400 U.S. 902 (1970).

III. Whether after invalidating the six-month defect discovery provision of the sales contract, the trial court erred in failing to replace that provision with another discovery period of a duration no longer than four years.

Bess v. Bothman, — Minn. —, 257 N.W. 2d 791 (1977).

4 Williston on Contracts, §601 at 303 (3d Ed. 1961).

IV. Whether the trial court erred in invalidating the contract provision which limited buyer's remedies to repair or replacement of defective parts or to a refund of all or part of the purchase price.

American Elec. Power Co., Inc. v. Westinghouse Elec. Corp., 418 F.Supp. 435 (S.D. N.Y. 1976).

County Asphalt, Inc. v. Lewis Welding & Eng'r. Corp., 323 F. Supp. 1300 (S.D.N.Y. 1970), *cert. denied*, 404 U.S. 939 (1971).

Fredonia Broadcasting Corp., Inc. v. RCA Corp., 481 F.2d 781 (5th Cir. 1973).

Lankford v. Rogers Ford Sales, 478 S.W. 2d 248 (Tex. Cir. App. 1972).

Potomac Elec. Power Co. v. Westinghouse Elec. Corp., 385 F.Supp. 572 (D.D.C. 1974), *rev'd* on other grounds, 527 F.2d 853 (D.C. Cir. 1975).

Royal Indem. Co. v. Westinghouse Elec. Corp., 585 F. Supp. 520 (S.D. N.Y. 1974).

Southwest Forest Indus. v. Westinghouse Elec. Corp., 422 F. 2d 1013 (9th Cir.), *cert. denied*, 400 U.S. 902 (1970).

V-M Corp. v. Bernard Distrib. Co., 447 F. 2d 864 (7th Cir. 1971).

Wyatt Indus. v. Publicker Indus., 420 F.2d 454 (5th Cir. 1969).

J. White and R. Summers, *Uniform Commercial Code*, 380, 382 (1970).

V. Whether the jury's verdict that seller breached its express warranty is, in any respect, supported by the evidence.

Lewis v. Nelson, 277 F.2d 207 (8th Cir. 1960).

Havenfield Corp. v. H & R Block Corp., 509 F.2d 1263 (8th Cir. 1975), *cert. denied*, 421 U.S. 999 (1975).

STATEMENT OF CASE

This action arises out of the collapse of a 2,000 foot high television tower near Rowena, South Dakota on January 11, 1975, during a severe winter blizzard. Plaintiff, Community Television Services, Inc., (hereafter "Community") owned the tower which had been made and erected by Dresser Industries, Inc. (hereafter "Dresser"). Plaintiff commenced this action in the United States District Court, District of South Dakota, Southern Division, on August 19, 1975, alleging damages of $1,500,000.00 and predicating recovery on negligence, strict liability and breach of express and implied warranties.

The case was tried to a jury before Judge Fred J. Nichol, beginning on November 29, 1976. The court directed a verdict in favor of defendant on the claimed breach of implied warranty, but denied the balance of defendant's directed verdict motion. The jury found that defendant was not negligent in the design or construction of the tower, nor was defendant strictly liable in tort. The jury

did find that defendant had breached an express warranty and assessed damages of $1,385,001.61. Dresser's motion to vacate the judgment or for a new trial was denied, but the trial court conditioned this denial on a remittitur to $1,274,631.60, to which plaintiff consented. This appeal follows. This court has jurisdiction to consider the appeal pursuant to Rule 4(a) of the Federal Rules of Appellate Procedure 28 U.S.C. §1291.

STATEMENT OF FACTS

This case deals with the collapse of a 2,000 foot tall television tower during one of the most violent winter blizzards ever to have beseiged the Dakotas. This structure was a three-legged nine foot wide triangular column over one-third mile high with a support system of twenty-seven steel guy cables (A. 1366, A. 300) some of which were 6 inches in diameter and extended from the tower to the ground a distance of over one-half mile. (A. 1043).

Fortunately no one was hurt. Plaintiff's damage claims concern the tower, antenna, and two buildings, all of which were damaged or destroyed in the collapse.

Dresser's claims of reversible error on appeal are:

1. The trial court erred in striking several independently important provisions from the Warranties and Limitation of Liability portion of the contract between the parties, and

2. The jury's verdict for Community on breach of express warranty was without support in the evidence.

To understand Dresser's claims, it is important to consider the history and setting in which these two commercial en-

tities twice negotiated contracts for the making and erection of a television tower, as well as the testimony relevant to the 60 psf warranty.

Tall Towers

The demands of modern television broadcasting brought about a relatively new structure on the horizon in the Midwest and West—the "tall tower," a needle thin metal structure, rising 1,500 feet to 2,000 feet above the ground on top of which is placed an antenna for broadcasting television and FM radio signals. The simple lines of the tall tower mask the sophisticated engineering techniques involved in its design and construction. (A. 1042-1045). Comprised of three interconnected legs of solid metal, the tower itself weighs many thousands of tons, and while subject to interacting forces of gravity, wind, weather, and its own motion, the tower is held in a delicate, yet relatively rigid balance, by long guy cables carefully set to an appropriate and very high tension. (A. 1042-1045).

Given the nature of this type of structure, it is not surprising that modern engineering is not yet able to solve all of the problems associated with building a tall tower and maintaining it erect. (A. 1042-1045). For example, the problem of harmonics, that is, oscillation of the guy cables and, perhaps, of the tower itself, caused by particular air movements corresponding to the natural vibration frequency of the structure (A. 699, 700) poses a threat to tower stability, but has not been solved. (A. 1045).

Community—Dresser Contract Negotiations.

Here we are dealing with two commercial entities, Dresser and Community, who negotiated two agreements, commercial in nature. The business organization Community was formed in approximately 1965 by two separate and independent corporations with various radio and television broadcasting facilities in eastern South Dakota and elsewhere. One of Community's constituent corporations operated KELO, a radio and television organization which started TV broadcasting in 1953, (A. 270) and which had been operating at least three separate television stations (each with its own tower), prior to the initial Community—Dresser contract negotiations in 1966 (A. 45, 99, 123). Each of these three towers had been constructed for KELO by Stainless, Inc. (A. 45, 99), one of the major manufacturers of all towers in the United States.

The other constituent corporation forming Community operated KSOO. Formed during or before the early 1930's, this station, starting in 1960, broadcasted its TV signals from a 1,000 foot tower near Flandreau, South Dakota (A. 219, 220, 269, 270).

About 1965 KELO and KSOO determined that it would be economically advantageous for them to construct a 2,000 foot tower for broadcasting television signals for both stations (A. 46, 47). The new tower was to be owned jointly by the stations through the corporate entity Community. (A. 124).

In late 1965 Community embarked on a program to accumulate relevant information and negotiate with the three domestic tall tower manufacturers. (A. 47, 50).

Leo Heisel, director of engineering for the three television stations owned by the KELO television corporate organization (A. 45, 122-123), was assigned principal responsibility for initiating and developing the technical aspects of this tall tower project. (A. 124). Heisel was tech-

nically trained and had 15 years experience in both the technical and business areas of a number of television station operations, including equipment purchasing. (A. 43, 45). His counterpart at KSOO (Max Pierce) was also available for consultation and advice. (A. 124, 272). In addition, Larry Bentson, a senior officer with KELO, and Howard Ahrendt also played roles in the investigation and negotiation process.

After contacting the legal and technical consultants to prepare the necessary documentation for the required FAA approval (A. 46, 125-126), Community consulted with RCA and GE concerning various matters, including the appropriate type of antenna for this tower. (A. 126).

Community selected RCA for the antenna. Thereafter, during January, February and March of 1966 RCA sent out certain tower specifications to each of the three domestic tall tower builders, Dresser, Stainless, Inc. and Kline Iron & Steel. (A. 613, 620). Through written correspondence and other communications, Heisel and Larry Bentson (A. 613-620, 988-990) received information and conducted negotiations concerning various aspects of the proposed tower, including its price, with representatives of Dresser. In particular, Community received price and design specification information from Robert McKinney, the sales representative of Dresser. (A. 128). Community, through Heisel, Bentson and others, also received such information from Kline Iron & Steel, and its sales representative, James Trotter. (A. 613, 620).

In approximately May of 1966, Community's inquiries into and negotiations concerning the 2,000 foot tower project developed into face to face bargaining. Representatives of each of the three tower manufacturers personally met in Sioux Falls with Heisel and other Community personnel. (A. 128). The purpose of each visit was it discuss the tower project and each company's contract proposal.

After more than five months of investigation and study by and on behalf of Community, and after bargaining with the other tower manufacturers, Community, through Heisel, met with McKinney on May 25, 1966 to discuss and explain the Dresser proposal (A. 992). McKinney testified that he, Heisel and Howard Ahrendt engaged in comprehensive discussions and negotiations of the contract including the portion thereof entitled, "Terms and Conditions of Sale". (A. 993). It was that section of the contract which contained the warranty provision. McKinney further said that, in accordance with his customary procedure, he reviewed each item of the "Terms and Conditions" with the Community team. (A. 993, 994). McKinney explained that this portion of the Dresser contract received special attention in the negotiation process because the price of the tower is clearly predicated upon the scope and extent of the business risks assumed by the respective parties under these provisions. For example, if a customer requested Dresser to expand its warranty or damage limitation provision, the purchase price would have to be adjusted to reflect and take into account such expanded contingent liabilities. (A. 993, 994, 1021). In fact, McKinney indicated that if the purchaser insisted on significant changes in the warranty and damage limitation provisions, Dresser might decide not to bid on the project at all. (A. 993, 994, 1021). Trotter, a competitor, not only agreed with McKinney's statements (A. 603, 605) but said Kline would not build a tower without a terms and conditions clause. Finally, McKinney's testimony indicates that neither Heisel nor Ahrendt requested or demanded any modification of the terms and conditions whatsoever. (A. 994, 1021).

Although the scope and extent of McKinney's testimony is disputed by Community, Heisel testified that he was not interested in the "Terms and Conditions" part of the contract. (A. 1220). There is, however, no dispute about the fact that Heisel and McKinney did discuss the written Dresser contract, and that Community clearly had the opportunity to request changes.

After the negotiation session on May 25, 1966, Community took Dresser's proposal under advisement and presumably further reviewed the matter. It at least had the opportunity to consult with its attorney and other professionals concerning all aspects of the Dresser proposal. Community also had the opportunity during this interval to compare the Dresser proposal with those offered by Kline and Stainless or to use the Dresser proposal as a negotiation tool with those competitors. Suffice to say that Community ruminated about the Dresser proposal for almost 60 days, and it was not until July 20th that they formally accepted and executed the Dresser contract. (A. 995, 996, Ex. AJ). Thereafter, Dresser began fabrication of the tower and it was erected and became operational in October of 1967. (A. 227).

The Collapse of Community's First Tower and Purchase of Replacement Tower from Dresser Under Identical Terms and Conditions

On June 22, 1968, this tower collapsed when an airplane clipped and severed one of the 27 cables supporting the tower. (A. 228).

The sequence of events that transpired after this first collapse are of telling import in establishing the proper business context in which to judge this dispute.

After the tower collapse, Heisel and the other officials

at Community did not—as they had done the first time—investigate and evaluate all the tower manufacturers to determine the current competitive terms and conditions available. Instead, Heisel simply called McKinney at Dresser and, in effect, ordered a replacement tower. (A. 61, 62). After the call, McKinney met with Heisel in Sioux Falls to discuss a replacement tower. (A. 67). McKinney submitted to Heisel a contractual package including Dresser's "Terms and Conditions of Sale," which were identical to the documentation supporting the first tower. Because the "Warranty and Limitation of Liability" provision thereof forms such an important part of this appeal and is identical in both the 1966 and 1968 contracts, it is set out in full at the end of this statement of facts. The only variance in the proposal for the new tower was a slight increase in price to $385,000 (A. 1364) and provisions allowing Dresser to utilize salvageable materials from the first tower.

This contractual proposal was submitted to Heisel on July 2, 1968, but again was not signed by Bentson on behalf of Community until a month later on August 5, 1968. (A. 171). The record does not reveal whether, during that interval, Community reevaluated the legal and technical aspects of the proposed transaction, consulted with professionals, or compared Dresser's proposal with those then being offered by the other tower manufacturers. However, it certainly had the opportunity to do so. Again Community sought no change in the Warranty and Limitation of Liability provisions. (A. 1000, 1021).

Dresser commenced fabrication of the second tower which was erected and became operational in May of 1969. (A. 69).

Tower Inspection and Maintenance Are Essential

The contractual allocation of risk with respect to tower damage cannot be viewed in a vacuum. The control and maintenance of this tower must be considered. On completion of its erection the control of this tall tower was turned over to Community, including the responsibility for providing periodic inspection, maintenance and repair.

The design of tall towers and their constant exposure to the forces of weather make the performance of periodic inspection, maintenance and repair work on the tower essential to preserving its structural integrity. (A. 448, 600, 744). Inspection of a tall tower involves a comprehensive check of each aspect of the structure. (A. 179, 184). Thus, for example, the tension of the guy cables, a crucial element in tower stability (A. 601), must be tested. In addition, the tower should be analyzed to determine if it is "plumb", that is, standing straight. (A. 178). The component parts of the tower, the fittings of the tower legs, the guy cables and their fittings, dampeners and a variety of other features must be periodically monitored and maintained or replaced to insure the tower's stability within its environment. (A. 180-184, 186, 190, Ex. 27).

Tower manufacturers caution about the importance of proper periodic inspection and maintenance of towers, particularly tall towers. James Trotter of Kline Iron & Steel testified his company recommended that maintenance work be performed on tall towers at least every six months, and more often if the tower had been subjected to any severe weather conditions (A. 600). Glennis Johnson, whose company was retained by Community to inspect this tower and to perform maintenance work on it, stated that he customarily inspected tall towers twice a

year, immediately before and after the winter season. (A. 187).

Clearly, Community knew that periodic inspection was essential. Between May, 1969 and January, 1975, a period of over five and a half years, Community hired several different independent contractors to perform inspection, maintenance and repair work. Sometime after the tower had been erected, Johnson Tower Service of Minot, North Dakota, was retained by Community to inspect this and all of KELO's towers and perform appropriate repair work at six-month intervals. (A. 187). This company conducted a number of comprehensive inspections and did a variety of work on the tower after Dresser turned the tower over to Community (A. 177, 178). Certain short-notice repair and maintenance work was also done to the tower by a maintenance contractor living in the Sioux Falls area. (A. 84, 194, 205). Finally, a significant maintenance operation was performed on the tower in 1972. After a KELO employee reported that certain guy cables appeared improperly tensioned, Community did not contact Dresser, but had Mark Pyron, an independent contractor, inspect all the tower guy cables in February, 1972 and retension certain cables (A. 81, 1374). This was the last retensioning done on this tower before its collapse about three years later. (A. 449, 745).

Collapse of Tower No. 2

On January 10 and 11, 1975, a severe winter blizzard, described by a Community employee, the local newspaper, a utility booklet and the Weather Service as the "storm of the century," swept across the Dakotas. (A. 253, 912). In the unique weather conditions generated by that storm, the tower collapsed.

Although the tower collapsed in the early morning hours of January 11, this intense storm had been developing and building since January 8. (A. 901). The magnitude of the storm was reflected, in part, by the gusting winds it generated with velocities on the evening of January 10 and the morning of January 11 up to 80 miles per hour near the top of the tower. (A. 899). The latter wind velocity qualified the storm as being of hurricane proportions. (A. 899). Even after the tower came down, continued high winds caused significant blowing and drifting snow, with zero visibility and falling temperatures. (A. 908).

During the acknowledged height of the storm—January 11, at 1:47 a.m.—Community's tower collapsed. (A. 241). One witness on the scene said that his visual observation was obliterated by the blinding snow which appeared to him to be blowing horizontally due to the wind velocity. (A. 255, 256).

60 psf Express Warranty

The jury's verdict is predicated solely on a breach of an express warranty. The 1968 contract specifies that the only warranties applicable to the transaction are those contained in the contract itself. (See second paragraph of Warranty and Limitation of Liability Clause, p. 17 this brief). The only express warranty here in issue under the 1968 agreement is the engineering specification that "The tower shall be designed to resist a uniform windload per drawing T-5172, sheet S-1, 60 psf on flats" (A. 1366). The only Community experts to testify regarding this warranty had no doubt the tower complied with this warranty. (A. 446-448, 727). With benefit of computer analysis John Minasian found that the tower, as designed and built complied with the 60 psf requirement. (A. 1119,

1120). No one testified that this tower did not comply with the warranty.

Expert Evaluation of Cause of Collapse

As developed by meteorologists John Murray and Dr. Harold Orville, a set of unique weather conditions prevailed for over three days before the tower collapse. During that time the top fourth of the tower was almost constantly imbedded in clouds containing a large amount of super-cooled water droplets. (A. 900-904, 908, 909, 943-954). In that period about 1,000 miles of such clouds passed through the upper part of the tower. (A. 901). Under these conditions, coupled with existing temperatures near freezing, the droplets would crystalize on the various tower members. This would cause a substantial accumulation of up to six inches of rime ice in a cone shape on the upper fourth of the tower (A. 901-902, 1118). Rime ice is virtually indistinguishable from snow. (A. 251, 903). In addition, increased winds, falling temperatures and snow the evening of January 10, caused snow to be impacted on the rime ice, thereby effectively increasing the upper portion of the tower area. (A. 441, 442, 902, 957).

John Minasian explained that this extreme accumulation of rime ice had a devastating adverse effect on the tower. (A. 901, 1114, 1116). It greatly enlarged the tower surface area exposed to the forces of the increasing wind. This pressure was transmitted down the tower legs. (A. 1116, 1117). Computer analysis of the forces exerted upon the tower by this combination of wind and rime ice established that the designed allowable strength was exceeded by 194 percent in the area of leg section 11, which failed

(A. 1115-1117). This was also far in excess of the safety factor built into the tower design. In other words, the rime ice accumulation caused the tower to be subjected to stress far in excess of those for which it was designed or warranted to withstand. This overstressing caused the collapse. (A. 725, 1115).

Plaintiff presented a possible explanation which, as their expert Clyde Hardy said, they backed into by believing they could rule out all other probable causes. (A. 724). It was an explanation that he admitted they really were not all that strong on. (A. 733).

The theory presented was that, at some unknown and undetermined area of wind, the guys might start to gallop, creating a harmonic resonance which might set the tower in motion and cause its failure. (A. 699-700). At this time the state of the art has not developed so as to prevent this. (A. 447, 730, 1045).

Mr. Hardy recognized that there had been no report of a galloping guy on this tower for years, that he did not know if the guys had been galloping at or before the time of collapse (A. 725, 726), that he did not know if the wind at the time was such as would cause the guys to gallop (A. 726), and that he had made no engineering computations to determine whether this should have occurred. (A. 726).

The relatively constant wind required to set up such a phenomenon was not what the wind charts for that night showed. They showed greatly varying gusty wind speeds and directions (A. 895, 896).

Dresser did not and could not have made a warranty concerning harmonic resonance since the control of this phenomenon was and still is outside the state of the art. (A. 447, 730, 1045).

TERMS AND CONDITIONS OF SALE

"9. WARRANTY AND LIMITATION OF LIABILITY: Seller warrants, for a period of six months, that products of its own manufacture and any construction performed hereunder by the Seller shall meet the applicable specifications incorporated in this contract, and be free from defects in material and workmanship. Provided Buyer submits a claim in writing to Seller immediately upon its discovery and in any event within six (6) months after shipment if no construction is performed hereunder or within six (6) months after final acceptance by Buyer if construction work is performed (or within six months from notification of completion by Seller if Buyer wrongfully refuses or delays final acceptance), Seller shall, at Seller's sole option, repair, replace or refund an equitable portion of the purchase price of any product or work which Seller determines to have been defective or failed to meet applicable specifications If construction work is not performed by Seller, then: (i) Buyer acknowledges that defects arising from improper or inadequate construction are not covered by this warranty, (ii) Buyer shall return the product, upon which any claim is based, f. o. b. Seller's factory for Seller's inspection and/or repair, and (iii) all repairs or replacement by Seller shall be f. o. b. Seller's factory. Items not manufactured by the Seller are warranted and guaranteed only to the extent and in the manner warranted and guaranteed to the Seller by the manufacturer of such items and then only to the extent the Seller is able to enforce such warranty or guaranty.

Except for obligations expressly and specifically assumed under the other clauses of these Sales Terms, the foregoing is Seller's only warranty, obligation, and liability, under

tort (including alleged negligence) contract or otherwise for or in connection with its products, work and services or use thereof. THE FOREGOING IS EXPRESSLY IN LIEU OF ALL OTHER WARRANTIES WHATSOEVER, EXPRESS, IMPLIED AND STATUTORY, INCLUDING WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS. IT IS SPECIFICALLY UNDERSTOOD SELLER'S PRICE IS BASED UPON THE FOREGOING LIMITATION OF LIABILITY AND BUYER'S WAIVER OF ANY AND ALL CLAIMS FOR DAMAGES." (Emphasis as in original) (Ex. 26; A. 1363). (Through the balance of this brief this "Warranty and Limitation of Liability" provision will be referred to as "Item 9").

ARGUMENT

This case concerns the enforceability of a commercial agreement between two corporate entities, and raises important questions under the Uniform Commercial Code.

In 1968 Community and Dresser contracted for the sale of a 2,000 foot transmission tower. In the terms and conditions of their written agreement they allocated the risks attendant to that transaction, and defined the limits of the seller's liabilities.

This was a commercial transaction, in which the parties stood on an equal footing in both their strength and ability to bargain. In such circumstances the courts have held that the parties' agreed-upon terms are controlling. *Cryogenic Equip., Inc. v. Southern Nitrogen, Inc.*, 490 F. 2d 696, 699 (8th Cir. 1974); *Southwest Forest Indus., Inc. v. Westinghouse Elec. Corp.*, 422 F. 2d 1013 (9th Cir.) *cert. denied*, 400 U.S. 902 (1970).

In 1975, during a severe winter blizzard, the tower purchased by Community collapsed. Under the terms of the parties' agreement, the financial burdens of that collapse were Community's. But the District Court ruled that those terms were unreasonable and refused to give them controlling effect.

The trial court erred in emasculating this agreement because it refused to acknowledge the commercial setting in which it arose—a refusal which led it to misconstrue the contract and to apply incorrectly the provisions of the Code.

This Court must reach an independent judgment as to the meaning and import of these parties' agreement. *Ralston Purina Co. v. Hartford Accident and Indem. Co.*, 540 F. 2d 915 (8th Cir. 1976). It then must decide whether that agreement was enforceable. The record and the law establish that it was.

The record also demonstrates that the jury's verdict was unsupported by the evidence. The contract issues will be discussed first.

I.

THE TERMS AND CONDITIONS OF THE PARTIES' CONTRACT ENTITLE DRESSER TO JUDGMENT IN ITS FAVOR AS A MATTER OF LAW.

The paramount issue on this appeal is whether the contract's "Warranty and Limitation of Liability" clause[1] should be enforced in accordance with its clear meaning and intent. For if that clause is legally controlling, Dresser was entitled to judgment as a matter of law in this case.

[1]Hereinafter referred to as "Item 9."

In denying Dresser's motion for a directed verdict, the court below not only refused to enforce Item 9, but drastically departed from its intended purposes and restructured the very essence of the parties' bargain. An analysis of the agreement and the context in which it was reached makes clear that that departure was unwarranted.

Item 9 of the Community-Dresser contract served four functions relevant to this appeal: 1) It incorporated by reference an express warranty; 2) It extended that warranty to future performance; 3) It prescribed the period in which defects had to be discovered; and 4) It defined the scope of Community's remedies and Dresser's liabilities with respect to defects discovered during the prescribed period. Each of these functions was integrally related to the particular nature of this commercial transaction and to the specific needs of these corporate entities. Each is discussed separately below.

1. *Dresser's Express Warranty.* The trial court found that the engineering specification which stated that "the tower shall be designed to resist a uniform windload per drawing T-5172, sheet S-1, 60 psf on flats" created an express warranty as a matter of law (A. 1366). Dresser does not now nor has it ever contested that finding.

This specification contemplated the construction of a guyed tower designed to withstand 60 pounds of pressure per square foot on its flat surfaces (A. 1366). As explained by the experts, this is a standard specification in the industry for the section of the country in which the tower was erected (A. 728, 729). It means that the structural members of the tower will be of sufficient strength to withstand, not only the tower's dead load (i.e., the constant weight of the structure and the stress of the guy

wires), but also the "live" load of pressure transmitted by the wind up to a velocity of approximately 120 m.p.h. (A. 420, 421). However, if the tower is subjected to other sresses or weight from other factors, such as ice, its wind loading capability under this specification is correspondingly reduced. (A. 1116, 1117, 441, 442). As will be discussed in detail in Section II, but worthy of mention here, not one expert witness testified that the Community tower failed to meet the 60 psf wind loading specification.

2. *The Future Performance Warranty.* In the first paragraph of Item 9, Dresser warranted that the tower would meet the 60 psf specification for six months after final erection. As will be discussed later in more detail, this provision constituted an expansion of Community's warranty rights under the Code, since the Code provides that a seller's warranty does not extend to future performance absent explicit agreement to the contrary (UCC §2-725).

3. *The Defect Discovery Provision.* The first paragraph of Item 9 served a second function separate from the above; it provided that remedies were to be available only for defects discovered by Community within the tower's first six months.

This provision was particularly appropriate in the context of Dresser and Community's transaction. For immediately after those first six months, Community was to begin a comprehensive program of maintenance and repair, functions which would affect the tower's integrity and over which Dresser was to have no control.

4. *Community's Remedies and Dresser's Labilities.* The parties provided in Item 9 that Community should have three exclusive remedies in the event that the tower or any of its parts proved defective: 1) Repair; 2) Re-

placement, or 3) Refund of an equitable portion of the purchase price. This the Code expressly authorized them to do. (UCC §2-719).

The remedies provision in Item 9 is not unique to these parties. It is one common to contracts in the tower industry. (A. 604-605, Ex. AV). And it is one frequently used in commercial sales of other complex equipment. The Code states these provisions should be given effect. (UCC §2-719, Official Comment 1). The courts have unhesitatingly agreed. *Southwest Forest Indus. v. Westinghouse Elec. Corp.*, 422 F.2d 1013, 1019 (9th Cir. 1970); *Fredonia Broadcasting Corp., Inc. v. RCA Corp.*, 481 F.2d 781, 798 (5th Cir. 1973).

In allowing the parties to provide exclusive remedies for breaches of warranty, the Code recognizes that the purpose of such provisions is to limit the damages recoverable by the buyer. (UCC §2-719(1)(a)). Thus, in providing for particular remedies in the event of a breach, the Community-Dresser contract had the effect of limiting any recovery to refund of all or a part of the purchase price. The contract specifically stated that the remedies provided were to be Dresser's only liability, and, in boldface print, that Community waived all other claims for damages.

This limitation of liability lay at the heart of the parties' bargain. For it was upon the inclusion of that limitation that the price of the tower turned. This the contract explicitly stated in the boldface type of Item 9.

A. The Trial Court Erred in Ruling that the Future Performance Warranty Was Unreasonable.

Item 9 of the contract warranted that the tower would meet contract specifications for six months after installation. It also provided that Community could claim damages arising out of a defect in the tower only if the defect was discovered within the first six months after installation. These clauses are closely allied but, as indicated above, they are analytically separable. The trial court did not separate these warranty provisions, but it implicitly found that both the six-month warranty of future performance and the six-month discovery period were unreasonably short.[2] In this brief, the two six-month provisions will be discussed separately, beginning with the six-month warranty of future performance.

The future Performance Warranty Expanded Community's Rights under the Code

In finding that the six-month warranty of future performance was unreasonably short, the trial court in effect held that Dresser was under a legal duty to provide a "reasonably" long warranty of future performance. The court committed an error because the Uniform Commercial Code, which governs this transaction, imposes no such duty. In fact, by granting a six-month warranty of future performance Dresser expanded, rather than limited, the rights available to Community under the Code.

Under the Code, a warranty pertains to the characteristics of a product *only* at the time of delivery and does not extend to future performance unless the parties explicitly so agree. This principle is found throughout the Code, but is most clearly expressed in §2-725,which provides in pertinent part:

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[2]In its Memorandum the trial court stated: "[D]efendant takes issue with this court's findings that the six month warranty limitation was manifestly unreasonable." The court did not file Findings of Fact and Conclusions of Law.

> (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. *A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance* the cause of action accrues when the breach is or should have been discovered. (Emphasis added.)

As this section plainly indicates, a seller is under no obligation to give a warranty of future performance at all. If the six-month future performance warranty had not been part of Item 9, the effect would not have been, as the trial court assumed, to extend a warranty of future performance into the indefinite future. Rather, there would have been no such warranty at all.

In view of the fact that the six-month warranty expanded, and did not in any way limit, Community's rights under the Code, Judge Nichol's finding that the six-month warranty was "manifestly unreasonable" is plainly erroneous.

Community may challenge this conclusion by arguing that the content of the express warranty—"The tower shall be designed to withstand a uniform wind load . . . 60 psf on flats"—gave rise by inference to a warranty of future performance not limited to six months. This position is untenable under §2-725, which requires such a warranty to "*explicitly* (extend) to future performance" (emphasis added). Moreover, such a theory has been foreclosed by this Court in *Binkley Co. v. Teledyne Mid-America Corp.*, 333 F. Supp. 1183 *aff'd.*, 460 F. 2d 276 (8th Cir. 1972). In *Binkley*, a purchaser of welding equipment brought suit for breach of the following express warranty four years and six days after the equipment's delivery:

> This machine must, in the range of the product, as above, be capable of welding at 1000′ per fifty-minute hour or a gross rate of 1200′ per hour.

In response to Teledyne's assertion that the claim was barred by the four-year statute of limitations in §2-725, Binkley argued that the above warranty explicitly extended to the future performance of the equipment.

In its opinion the court disagreed, noting "a judicial reluctance to infer from the language of express warranties terms of prospective operation that are not clearly stated." 333 F. Supp. 1183, at 1186. This Court affirmed, stating its agreement wih "Judge Webster's well-reasoned opinion that the proper construction of the statute makes the rule, rather than the exception, applicable to this case." 460 F. 2d 276, at 277. Dresser's design warranty, like Teledyne's, contains no words of prospective operation.

Moreover, no prospective warranty is created by the difficulty of testing the design at the time of delivery. This issue was raised and resolved in *Raymond-Dravo-Langenfelder v. Microdot, Inc.*, 425 F. Supp. 614 at 618 (D.C. Del. 1977). The court said:

> The difficulty of determining conformity with a warranty at the time of delivery is a problem common to many situations involving warranties by description. Such difficulties have not been regarded as controlling, however, in the absence of contract language explicitly warranting future performance.

Similarly, the fact that a product has a relatively long useful life does not create a warranty of future performance. This theory was raised by the buyer in *Beckmire v. Ristokrat Clay Prod. Co.*, 36 Ill. App. 3d 411, 413, 343 N.E. 2d 530, 532 (1976), and emphatically rejected by the court, which said:

> [Appellant] argues that the nature of brick is such that a buyer can reasonably expect it to last for many years. The cause of action should not therefore accrue nor the statute of limitations run until the discovery of the defect—in this case, in 1970 . . . The mere expectation, however reasonable, that due to the nature of a particular product the statute of limitations on the warranty begins to run upon discovery of the defect is not an adequate basis for ignoring the clear language of the statute.

The *Beckmire* case is particularly relevant in view of the trial court's apparent reliance on the tower's long anticipated life in creating out of whole cloth a warranty of future performance. (A. 1792, 1793).

It is therefore clear that the six-month warranty of future performance expanded Community's rights under the Code. Consequently, the trial court's finding that the warranty was unreasonably short was clearly erroneous.

This analysis also highlights the trial court's error in relying on §1-204 of the Code, which states in part:

> (1) Whenever this Act requires any action to be taken within a reasonable time, any time which is not manifestly unreasonable may be fixed by agreement.

It was from this section that Judge Nichol obtained the "manifestly unreasonable" standard, which he applied to the six-month warranty of future performance. Even a cursory examination of §1-204 reveals that it has no application whatever to the warranty of future performance. It applies by its terms only to situations where "this Act requires any action to be taken within a reasonable time." As indicated above, the Code does not require any warranty of future performance to be given. Moreover, the giving of such a warranty does not constitute an "action to be taken within a reasonable time." It is evident that §1-204 does not govern warranties of future performance, and that the trial court's reliance on this section was wholly misplaced. Since the Code does not require that any warranty of future performance be given at all, it does not impose any such "reasonableness" standard on a warranty of future performance.

For these reasons, the trial court's finding that the six-month warranty of future performance was unreasonably short should be reversed.

B. The Trial Court Erred in Failing to Enforce the Defect Discovery Provision.

As we have already seen, in the first paragraph of Item 9 Dresser's warranty was extended for a future performance of six months. But that paragraph contained a second provision which had a separate and limiting effect. Whether that provision is to be enforced is one of the key issues in this appeal.

Item 9 provided that Dresser's liability was to be limited to those defects discovered by Community within the tower's first six months. Thus, when this tower fell more than five years thereafter, the terms of the agreement made that risk Community's.

The issue then becomes whether the six-month limitation was enforceable. The trial court never articulated this issue because it failed to perceive that *two* provisions were actually involved and that each, in fact, was functionally distinct: one relating to future performance, and the other to the period for discovering defects. Having ex-

amined the "reasonableness" of only the former, the court then went on to strike the latter as well. That ruling must be reversed for the following reasons.

The Commercial Context of the Parties' Transaction Supports the Enforceability of this Provision.

Community is a sophisticated corporate entity whose constituent companies have extensive experience in commercial transactions. It was represented in this transaction by a staff of able negotiators and had access to engineering consultants and lawyers. (A. 46, 125). The fact that this contract was entered into by two experienced commercial entities whose bargaining power was relatively equal is strong evidence that it should be enforced as written. *Southwest Forest Indus., Inc. v. Westinghouse Elec. Corp.*, 422 F.2d 1013 (9th Cir. 1970); *Fredonia Broadcasting Co. v. RCA Corp.*, 481 F.2d 718 (5th Cir. 1973); *Royal Indem. Co. v. Westinghouse Electric Corp.*, 385 F. Supp. 520 (S.D.N.Y. 1976). In *Potomac Elec. Power Co. v. Westinghouse Elec. Corp.*, 385 F. Supp. 572, 579 (D.D.C. 1974), rev'd on other grounds, 527 F.2d 853 (D.C. Cir. 1975) the court observed:

> The negotiated agreement between these parties was not a contract between two small unknowledgeable shop keepers but between two sophisticated corporations each with comparable bargaining power and fully aware of what they were doing.

The manner in which Community entered into its first contract is strong evidence that the second contract should be enforced to its letter. Community embarked on its first Dresser tower purchase with a careful and methodical approach. It spent months amassing information and preparing documents. (A. 125-128, 613-620, 980-999). It consulted engineers and attorneys. (A. 46, 125, 126). Then, armed with this reserve of information and advice, it contacted every member of the tower industry. (A. 49, 127, 128). After five months of competitive bidding, Dresser's proposal was formally accepted. (A. 988-992, 995, 996). In light of these facts any claim of duress or unequal bargaining power is negated by *County Asphalt, Inc. v. Lewis Welding & Eng'r Corp.*, 323 F. Supp. 1300, 1308 (S.D.N.Y. 1970), *cert. denied*, 404 U.S. 939 (1971), in which the court said:

> Furthermore, the existence of competitors in defendant's industry, and plaintiff's utilization of that fact by procuring alternative contract proposals from defendant's competitors, precludes any argument of unequal bargaining power.

But this was only the beginning. The parties engaged in extensive discussions, changing from time to time various terms of Dresser's original offer. (A. 988-991). On May 25, 1966, the parties met and examined at length the terms of the contract. (A. 128, 992, 993). For almost sixty days thereafter Community reviewed and ruminated about the agreement before finally accepting it on July 20, 1966. (A. 128, 995, 996).

A year later the first tower fell when one of its guy wires was severed by a low-flying airplane. Once again, Community contacted Dresser. Once again, it had an opportunity to negotiate—this time with good reason to evaluate the economic consequences of the tower's collapse. Once again, Community agreed to the six-month limitation. (A. 998, 999, 1000, 1021).

The fact that Community entered into essentially the

same contract twice (A. 998, 999) also is strong evidence that the contract was freely consented to and should therefore be enforced. *Boone Valley Coop. Processing Ass'n v. French Oil Mill Mach. Co.*, 383 F. Supp. 606, 612 (N.D. Ia. 1974); *Architectural Aluminum Corp. v. Macarr, Inc.*, 70 Misc. 2d 495, 333 N.Y.S. 2d 818 (1972).

A commercial party seeking to evade its contractual responsibilities bears a heavy burden of proof. But Community presented no evidence to show that it was a victim of surprise, oppression or duress. This complete lack of evidence is highlighted by Community's failure to call Lawrence Bentson, who signed both contracts on its behalf, to testify on these issues. On the contrary, the record reveals that the contract was negotiated freely and fairly by two experienced commercial entities. See *Potomac Elec. Power Co. v. Westinghouse Elec. Corp.*, 385 F. Supp. 572 (D.D.C. 1974).

Community entered this transaction with one overriding purpose in mind: To buy the best tower at the lowest possible price. Dresser was not an unwilling partner, but it made clear that the price of the tower would depend on the risks it was asked to assume.

The parties agreed on the price, they agreed on the risks, and they included in their contract the six month defect discovery period. That limitation was a basis of their bargain and should be enforced.

The Frequency of Tower Maintenance and Repair Demmonstrates that 6 Months Was Neither Arbitrary Nor Unreasonable.

The six-month defect discovery provision of Item 9

should be enforced because the integrity of the tower depended on inspection, maintenance and repair at six-month intervals. (A. 448, 600).

The commercial reasonableness of a sales contract provision which allocates the business risks associated with the transaction obviously depends in part on the extent to which the buyer or the seller is responsible for the performance of the product. When responsibility for the product's continued care and maintenance is entrusted to the purchaser, it is appropriate to tailor the warranty and remedy provisions of the contract accordingly.

Dresser and Community agreed pursuant to the defect discovery provision that six months after construction was completed, all risks of the tower's non-performance would pass from Dresser to Community. This allocation of commercial risk was particularly appropriate because it corresponded to the time when the tower should be inspected and maintained. The warranted item was a highly complex and sophisticated structure which was known to be susceptible to the forces of weather, and it required inspection, maintenance and repair at approximately six-month intervals to ensure its integrity. (A. 187, 600). All witnesses who testified on the subject agreed that maintenance and inspection of the tower were essential. (A. 448, 600, 744).

In light of the tower maintenance requirements, the six-month defect discovery period was not arbitrarily chosen. On the contrary, the warranty was reasonably related to the risks attendant to tower maintenance and stability. Precisely six months after Dresser's erection of the tower, Community or its agents were to commence a comprehensive and regular program of inspection, repair and maintenance of the tower and its entire support system. (A.

448, 600, 1376, 1377). What was or was not done in this regard would unquestionably have a direct and critical bearing on the structural integrity of the tower. (A. 448). For example, the guy cables had to be retensioned periodically. (A. 178, 179, 600, 601). One of Community's witnesses acknowledged that a tall tower in Texas had collapsed because of improper cable tension. (A. 741, 742).

Since Community was to have responsibility for maintenance, it is not surprising that Dresser sought a 6 month cut-off date. When a tower that has stood for a period of time collapses, it is often difficult, if not impossible to determine the cause of the collapse. Moreover, even where the cause can be ascertained (e.g., improper tension on the guy cables), it may be impossible to tell whether the builder or the company performing maintenance was responsible for the tower failure. Consequently, to extend the warranty beyond six months would subject Dresser to open-ended liability which very likely could result from the acts or omissions of another party over which Dresser could have no control. Thus, the defect discovery period was integrally related to the repair and maintenance responsiblity assumed by Community, and was a reasonable, and indeed necessary, element of the sales contract which appropriately allocated the business risks of the tower sale.

Neville case not applicable.

In its post-trial brief, Community cited only one case for the proposition that the defect discovery period was unreasonable: *Neville Chem. Co. v. Union Carbide Corp.*,

294 F. Supp. 649 (W.D. Pa. 1968) *aff'd.* in part and *vac'd* in part, 422 F.2d 1205 (3rd Cir. 1970), *cert. denied*, 400 U.S. 826 (1970). But the facts of that case are so clearly distinguishable from those of the case at bar, that a careful analysis of the opinion in *Neville* makes evident why there should be different result here.

While in this case Dresser was found free from all fault (A. 1359, 1379), the seller in *Neville* was particularly culpable. Not only had Union Carbide failed to use caution in manufacturing its product, it had been aware from the outset that the product was defective and had deliberately failed to warn its purchaser of that known and serious risk. It was the seller's breach of the duty to warn that persuaded the court that the contract was unenforceable; the principal issue was exculpation from negligence. Moreover, the provision at issue required notice within fifteen days, which was held unreasonable in view of the unique circumstances of the industry involved. See *Cyclops Corp. v. Home Insurance Co.*, 389 F. Supp. 476, 481 (W.D. Pa. 1975) *aff'd* 523 F.2d 1050 (3rd Cir. 1975).

But *Neville* is distinguishable from the instant case in another and dramatically more important respect: it involved a product whose defects could be conclusively determined in a limited period of time (but longer than seller allowed) and by a process well within the seller's control. This fact allowed the buyer to be fully protected without leaving the seller's risks open-ended. There is no such simple test of a tall tower's compliance with a warranty.

There are only two ways to test a tower's ability to withstand wind pressure of 60 psf. The first is to check its design by mathematical calculation, which can be done

within six months. The second is to wait for the winds themselves. If the first is sufficient, then Dresser must prevail for the evidence is uncontradicted that its tower met that test. (A. 446, 448, 727). But if the first test is inadequate, Dresser, along with every other manufacturer that warrants a product to meet environmental specifications, will be an absolute guarantor of the product for an indefinite time. Dresser's potential liability would terminate only on the occurrence of a wind of the requisite unusually high velocity, an event which may not happen for many years, if ever, and over which Dresser has no control. This would make it impossible for Dresser to limit its warranty to any reasonable period, which it is specifically permitted to do by §§2-316 and 2-719 of the Uniform Commercial Code.

This was not a contract of oppression or duress, nor was this provision unreasonable or unjust. It was agreed to by two commercial entities who bargained at arm's length, and who tailored their agreement to the unique contours of their transaction. The law requires that this provision be given its intended application.

As this Court observed in a contractual setting in *Geldermann and Co., Inc. v. Lane Processing, Inc.*, 527 F.2d 571, at 576 (8th Cir. 1975):

> It is not the province of the courts to scrutinize all contracts with a paternalistic attitude and summarily conclude that they are partially or totally unenforceable merely because an aggrieved party believes that the contract has subsequently proved to be unfair or less beneficial than anticipated.

C. The Trial Court was Required to Substitute a Reasonable Defect Discovery Period After Invalidating the Six-Month Provision.

The cardinal rule in the adjudication of contractual disputes is that the intention of the parties is to be given effect. 4 *Williston on Contracts* §601 at 303 (3rd Ed. 1961). Where a contractual provision is unenforceable as written, the court should examine the purpose the provision was intended to serve, and construe the contract to effectuate that purpose consistently with legal principles. See generally *Bess v. Bothman*, — Minn. —, 257 N.W. 2d 791 (1977).

Community and Dresser clearly intended that at some point in the life of this tower the risk of its failure would pass to the purchaser. This voluntary allocation of risks was expressly permitted under the Code. (§§2-719, 2-316). Moreover, such allocation was necessitated by Community's assumption of the obligation to maintain the tower.

In striking the defect discovery provision, the trial court ignored the intent of these parties that their respective risks have clearly defined limits, and their need to define such limits in accordance with the nature of this particular transaction. Rather than replace the provision, the court left a void in the contract, a void which made Dresser's liabilities open-ended.

If the six months to discover defects was unreasonable, the court should have turned to the Code for guidance. Such guidance was readily available in §2-725. The primary purpose of §2-725 is to prescribe a period of limitations, but it serves a second function relevant here. As illustrated by *Binkley*, that section also limits to four years

the time in which any defect, regardless of how apparent, must be discovered.[3]

If the defect discovery provision were unreasonable—a finding unwarranted by the facts of this case—the court had a duty to adopt an alternative which would have effected these parties' intent. Since a four-year discovery period is standard under the Code, it can hardly be considered unconscionably short. Accordingly, in determining a reasonable discovery provision to replace the six-month discovery clause, the trial court should have adopted, as an absolute maximum, four years.

Even if those four years began at the latest possible date—the end of the six months to which the warranty extended—it is clear that Community's recovery is precluded, for this tower fell more than five years thereafter.

D. The Limited Remedy Provision of the Sales Contract Provided Buyer With a Reasonable and Adequate Remedy Which Did Not Fail of Its Essential Purpose. It Should Have Been Enforced.

The Community-Dresser sales contract explicitly stated that in the event of breach of warranty, the buyer's remedies would be limited to repair or replacement of the tower or parts thereof, or to refund of all or part of the purchase price. It provided further that Dresser's obligations in the event of breach were limited to these reme-

[3]The defect discovery provision was obviously not a statute of limitations. For it did not stipulate when Community could bring an action, but only when a defect must have been discovered in order to be actionable. Had defects been discovered within the tower's first six months, the contract in no way impaired Community's right under the Code to bring suit within four years of that discovery.

dies, and that Community waived all other claims for damages.

The Uniform Commercial Code as enacted in South Dakota authorizes commercial buyers and commercial sellers to determine the nature of the remedies available to the buyer for breach of warranty, and to limit the remedies for a breach to repair or replacement of the defective product.[4]

Limited remedy provisions nearly identical in form and substance to that contained in the contract between Community and Dresser have been uniformly upheld in cases involving commercial sales of sophisticated machinery or equipment. *Southwest Forest Indus., Inc. v. Westinghouse Elec. Corp.*, 422 F.2d 1013 (9th Cir. 1970); *Wyatt Indus. v. Publicker Indus.*, 420 F.2d 454 (5th Cir. 1969); *Am. Elec. Power Co., Inc. v. Westinghouse Elec. Corp.*, 418 F. Supp. 435, 452-459 (S.D.N.Y. 1976); *Potomac Elec. Power Co. v. Westinghouse Elec. Corp.*, 385 F. Supp. 572 (D.D.C. 1974); *Royal Indem. Co. v. Westinghouse Elec. Corp.*, 385 F. Supp. 520 (S.D.N.Y. 1974).

A much litigated contract in the commercial sales area

[4]The following UCC sections are relevant:

UCC §2-719(1)(a): The agreement may provide for remedies in addition to or in substitution for those provided in this Article, inclusive, and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and *repayment of the price or to repair and replacement of non-conforming goods or parts.* (Emphasis added).

UCC §2-316(4): Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (sections 2-718 and 2-719).

§2-719, Comment 1: Under this section parties are left free to shape their remedies to their particular requirements and reasonable agreements limiting or modifying remedies are to be given effect.

has been that used by Westinghouse Electric Corporation in the sale of complex electric power generating machinery. These sales agreements have provided that the equipment would be warranted against defects for a period of one year, and that Westinghouse would repair or replace any defective machinery within that time period. Such a limited remedy was to be the only remedy available to the buyer in the event of a breach of contract. These remedy provisions, apparently without exception, have been upheld. See *Southwest Forest Indus. v. Westinghouse Elec. Corp.*, 422 F.2d at 1019-1020 (9th Cir. 1970); *Am. Elec. Power Co., Inc. v. Westinghouse Elec. Corp.*, 418 F. Supp. 435 (S.D.N.Y. 1976); *Potomac Elec. Power Co. v. Westinghouse Elec. Corp.*, 385 F. Supp. 572 (D.D.C. 1974), rev'd on other grounds, 527 F.2d 853 (D.C. Cir. 1975) (See 418 F. Supp. 435 at 453, n. 28).

Despite these authorities, the trial court held that the remedy provided by the sales contract failed of its essential purpose and was therefore invalid under UCC §2-719(2). Here, as in the case of the six-month provisions, the trial court improperly took upon itself the function of writing the parties' contract and refused to enforce the contract agreed upon by Community and Dresser. Once again, the trial court committed reversible error.

Section 2-719(2) provides that "Where circumstances cause an exclusive or limited remedy to fail of *its* essential purpose, remedy may be had as provided in this Act." (emphasis added). This clause is narrowly drafted; it applies only where unforeseen circumstances prevent an apparently reasonable remedy from being effective. It does not give the trial court carte blanche to void a remedy provision it

considers inadequate. White and Summers emphasize this fact in their discussion of §2-719(2):

> Comment 1 explains that this subsection applies to "an apparently fair and reasonable clause," which "because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain. . . ." Notice that both the statutory language and the comment refer to "its [i.e., the limited or exclusive remedy's] essential purpose. . ." That is, 2-719(2) should be triggered when the remedy fails of its essential purpose, not of the essential purpose of the Code or of contract law or of justice or of equity. To use the words of Professor Honnold, this provision "is not concerned with arrangements which were oppressive at their inception, but rather with the application of an agreement to novel circumstances not contemplated by the parties."
>
> J. White and R. Summers, *Uniform Commercial Code*, 380 (1972)

The remedy clause of Item 9 provided for repair, replacement or refund of the purchase price. Where the tower was a complete loss because of Dresser's alleged negligence or breach of warranty, refund of the purchase price presumably would be the appropriate remedy. It is evident that no "novel circumstances" intervened between the execution of the contract and the collapse of the tower to make the refund remedy fail of its essential purpose. The purpose of the refund remedy is to return to Community its purchase price. The refund remedy was viable; it did not fail of its essential purpose.

White and Summers agree that §2-719(2) should not be invoked where refund is an available remedy:

> There are probably relatively few situations where a remedy can fail of its essential purpose. Section 2-719(2) will probably be called into action most often in cases . . . when the exclusive remedy involves replacement or repair of defective parts, and the seller because of his negligence in repair or because the goods are beyond repair, is unable to put the goods in warranted condition. Section 2-719(2) might also apply when the exclusive remedy requires performance of an act by the buyer that is precluded by the seller's breach. For example, suppose an automobile manufacturer makes an exclusive warranty to repair and replace defective parts if such parts are delivered to its plant. If the entire car is destroyed as a result of defective wiring, the buyer would be unable to return the wiring to the manufacturer's plant. The exclusive remedy would therefore fail of its essential purpose.
>
> J. White and R. Summers, *Uniform Commercial Code*, 382 (1972)

There can be no claim that either of the two situations described by White and Summers is present in this case. There has been no allegation that Dresser has repudiated or negligently discharged any responsibility under the remedy provision. Moreover, neither of these two situations can arise where, as here, refund of the purchase price is also an available remedy.

Judge Nichol's error arose from his misunderstanding of the remedy provision. In his discussion at A. 1255 he made clear that he premised his ruling on the belief that 1) if any part of the tower were defective the tower would collapse, and 2) if the tower collapsed Community's only remedy would be repair or replacement of the defective part:

> And I think the evidence has been clear throughout this trial that any other member of that tower that failed, sure, all they're limited to is the cost of repairing that one member, that's ridiculous, because a member of a tower of this nature destroys the whole tower. (A. 1255).

Both of these premises are false. A defect in a single part will not necessarily destroy the whole tower; individual parts of this tower were in fact replaced during construction after being damaged by weather and at other times. (Exs. 11 and 12, A-81, 113-114, 1374-1375). But more important, if the tower did collapse because of a single defective part the appropriate remedy under Item 9 would be to "refund an equitable portion of the purchase price"—in this case, all of it. The trial court erred because it completely overlooked the refund remedy.

The Code makes clear that under these circumstances a "repair, replace or refund" remedy cannot fail of its essential purpose. Section 2-719(1)(a) explicitly permits a seller to limit the buyer's remedies to "repair and replacement of non-conforming goods or parts." Item 9 went farther than the Code requires and, as indicated above, there is no evidence whatever of unforeseen circumstances which have arisen to frustrate the parties' intent.

The case law similarly mandates the conclusion that the remedy clause did not fail of its essential purpose. In *Am. Elec. Power Co., Inc. v. Westinghouse Elec. Corp.*, 418 F. Supp. 435 (S.D.N.Y. 1976), the contract's damage provision (which was slightly broader than the provision at issue in this case) was upheld in part because:

> [T]he . . . contract specifically provides for a damage recovery distinct from the warranty to repair or replace . . . . Thus, if the generator, as a unit, cannot or has not been repaired so as to meet contract specifications, and has not been replaced by a generator that can, the full purchase price of the generator may be recovered as damages by the plaintiff. 418 F. Supp. at 459.

In many other cases, remedy provisions more restrictive than Item 9 have been upheld. See, in addition to the cases already cited in this section of the brief, *Fredonia Broadcasting Corp. v. RCA Corp.*, 481 F.2d 781 (5th Cir. 1973); *Lankford v. Rogers Ford Sales*, 478 S.W. 2d 248 (Tex. Civ. App. 1972).

Because Community expressly waived all other claims for damages whether arising out of contract, warranty or tort, it is evident that the contractual remedy precludes any claims for consequential damages arising out of the collapse as well as Community's claim for the cost of a new tower. *Southwest Forest Indus., Inc. v. Westinghouse Elec. Corp.*, 422 F. 2d 1013 (9th Cir. 1970); *Am. Elec. Power Co. v. Westinghouse Elec. Corp.*, 418 F. Supp. 435, 457, 458 (S.D.N.Y. 1976).

It should be emphasized that the remedy provision of the contract is separate and distinct from the warranty of future performance and the six-month discovery clause. Each clause articulates a particular and different aspect of the parties' bargain and therefore should be considered on its own merits. See generally, *V-M Corp. v. Bernard Distributing Co.*, 447 F.2d 864 (7th Cir. 1971); *County Asphalt, Inc. v. Lewis Welding & Eng'r Corp.*, 323 F.Supp. 1300, 1308, & 1309 (S.D.N.Y. 1970).

For these reasons, the remedy provision of the contract did not fail of its essential purpose and should be enforced according to its terms. This means that any recovery on the part of the Community must be limited, at a maximum, to refund of the tower's purchase price of $385,000. (A. 1364).

II.

THE JURY'S VERDICT THAT DRESSER BREACHED AN EXPRESS WARRANTY IS NOT SUPPORTED BY THE EVIDENCE AND MUST BE REVERSED.

That the trial court was wrong in allowing this case to go to the jury in the first place has, we submit, been established. Even if it had not been, the judgment against Dresser for breach of an express warranty cannot be allowed to stand. In short, and gauged by the most liberal standards of proof and inference available to Community, there is not a scintilla of evidence in this record upon which the jury could have based its verdict that the tower collapsed as a direct and proximate result of a breach of the only warranty involved in this proceeding, namely:

> "The tower shall be designed to resist a uniform wind load per drawing T-5712-Sheet-1, 60 psf on the flats."

Standards for Breach of Warranty

As instructed by the Court, in order to hold Dresser liable for breach of warranty, the jury had to find (1) *that Dresser breached its warranty* and (2) *that the breach was the proximate cause of the tower collapse.* (A. 1332, 1333).

In many breach of warranty cases, it is only the latter question (causation) which is seriously disputed and it is left to the jury to resolve the often conflicting expert testimony on the subject of causation. Here, however, the record is totally void of any evidence establishing that Dresser breached its warranty in the first place.[5] Community's causational testimony was—as we shall demonstrate—not only suspect from an evidentiary standpoint, but more importantly had no bearing whatsoever on whether Dresser's wind loading specification had been breached.

The Court allowed the case to go to the jury with *only* circumstantial causational evidence. In doing so, the Court ignored a crucial burden of proof requirement which it later acknowledged in its instructions. Dresser's liability (if any) was dependent on *two* elements of proof—first, that a breach of warranty occurred and second, that it caused the claimed injury. The jury was understandably confused and must have assumed that—if it believed Community's theory of causation—then Dresser must be liable. That, we respectfully suggest, was manifestly unfair and legally unwarranted.

There is No Evidence that Dresser Breached its Warranty

The most telling observation in this entire proceeding was made by the trial judge at the conclusion of plaintiff's case. Judge Nichol stated as follows:

[5]Decisions in this Court and other courts have conclusively established that although a jury is permitted to draw reasonable inferences from the evidence, it may not draw inferences "at war with undisputed facts." *Lewis v. Nelson*, 277 F.2d 207, 209, 210 (8th Cir. 1960); *Havenfield Corp. v. H & R Block, Inc.*, 509 F.2d 1263, 1269, 1270 (8th Cir. 1975), *cert. denied*, 421 U.S. 999 (1975). The jury verdict that Dresser breached the 60 psf warranty is, we submit, "at war" with the undisputed evidence presented in this case, and a directed verdict in favor of Dresser was required.

> . . . The thing that bothers me—and I guess Mr. Evans addressed it just before lunch—is, where is—I really don't see where there's any testimony on the part of your experts that there was any breach of a warranty as to the 60 pounds per square foot on flat surfaces. (A. 847).

Judge Nichol's comment was acutely accurate and it is incredible, given the foregoing recognition of the evidence, that the case was allowed to go to the jury, for nothing occurred later in the case to change this recognition.

One can read with meticulous care the entire record in this proceeding and will nowhere find even a shred of evidence that the tower was not designed to meet the 60 psf wind loading specification.

Moreover, counsel for Community was at a total loss when pressed by the court to explain this fatal evidentiary defect and could not pinpoint any testimony which even remotely suggests that Dresser breached its design warranty. Instead, and in a desperate effort to circumvent this crucial gap, counsel for Community suggested—quite inappropriately—that this is a *res ipsa loquitur* situation (i.e., since the wind was not 120 miles per hour, but the tower collapsed—it must have been designed improperly by Dresser). Such a specious position need not be dignified by a lengthy argument. Suffice it to say that the *res ipsa* doctrine requires that the instrumentality—in this case the tower—be in the exclusive control of the party against whom the doctrine is being asserted. Here, the tower had been totally out of Dresser's control for almost six years and had been worked on extensively (repair and maintenance) by agents of Community.

The Record Eestablishes That the Tower was Designed in Complete Accordance with the Dresser Specification.

Not only is there a total absence of proof that Dresser breached its warranty, there is persuasive and unchallenged evidence that the tower did, in fact, comply with the warranty made by Dresser.

None of Community's experts had been authorized or instructed to undertake an engineering analysis of the tower and its component parts to determine in fact whether it met the design specification of the contract. (A. 446). However, Carroll Kirkpatrick, one of Community's key expert witnesses, stated that he was sure (in his expert opinion) that the tower conformed to the 60 psf wind loading warranty. (A. 447, 448). Clyde Hardy, the senior member of Community's expert "team" concurred with Kirkpatrick and stated that he "*had no doubt*" that the tower did meet the 60 psf criteria. (A. 727).

The conclusion, expressed by Messrs. Kirkpatrick and Hardy, that the design specification had been fulfilled by Dresser was professionally confirmed by John Minasian, Dresser's key technical expert. Unlike Community's experts, Minasian was the *only* witness who did in fact make a comprehensive engineering and mathematical analysis of the tower and its component parts. His unequivocal conclusion was that the tower, as designed, met the wind loading specification of 60 psf on the flats, absent other factors. Minasian went one step beyond an analysis of the tower design itself and conducted a field investigation of the tower members after the collapse and thereby determined that the type of steel used in their fabrication conformed exactly to the design plans and drawings for the tower. (A. 1120). Minasian's well documented conclusions on these questions—proving that Dresser's design warranty had not been breached—*went totally unchallenged by Community.*

Not only did Community fail to prove that Dresser breached its warranty, but the record shows just the opposite was proved.

If Harmonic Resonance Caused the Tower Collapse—then Dresser Could not have Breached its Warranty.

A significant portion of the trial was devoted to the testimony of experts on the question of what *caused* the tower to fall. Dresser postulated the theory that an extensive buildup of rime ice on the tower had caused the collapse. Community advanced the theory that harmonic resonance was the *sole* cause of the tower destruction. However, that theory of causation cannot, we submit, establish or any way relate to Dresser's 60 psf warranty, because harmonic resonance and Dresser's warranty evolve from and deal with two totally distinct principles of physics.

Simply stated, Dresser warranted that the tower would not be *blown down* in winds up to 120 miles per hour absent other factors. If, however, the tower was destroyed by harmonic resonance, as suggested by Community, that would mean it was *shaken down* by intolerable vibrations from its guy cables. In short, harmonic resonance involves the physics principles of frequency and vibration and the stresses associated therewith. The 60 psf warranty deals exclusively with the physics principle of pressure transmitted by the wind against the tower members.

Community's experts agreed that harmonic resonance is a unique mechanical phenomenon which has con-

founded the state of the art in the construction of tall guyed towers and is an engineering problem which has never been totally solved. (A. 447, 730, 1045). These same experts also agreed that harmonic resonance is not dependent on high velocity winds and that its only connection with wind is that under the right circumstances there is a discharge of air around the guy cables which sets up a frequency of vibration which in turn can lead to a violent shaking of the tower.

Thus, Community's position is ironically self-defeating, for it attempted to establish a theory of causation which itself proves that Dresser's warranty was not breached. In short, if you accept Community's theory that the tower was shaken down due to the intolerable vibrations transmitted to the tower by harmonic resonance, then obviously the tower was not blown down by the wind.

Dresser's specification is entirely limited to wind loading in the structure and does not relate to other factors and the existence or nonexistence of harmonic resonance simply could not establish the first prerequisite to Community's case—namely, that Dresser had breached its warranty.

The fatal defect in the jury's verdict is that Community did not prove the 60 psf warranty was breached. Therefore the judgment based on that erroneous verdict must be vacated.

CONCLUSION

The trial court should have, but did not, sustain each of the separate and distinct provisions of the contract—the warranty of future performance, the defect discovery period, and the remedy and limitation of liability to repair,

IN THE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 77-1150

CIVIL

COMMUNITY TELEVISION SERVICES, INC.,

Plaintiff-Appellee,

vs.

DRESSER INDUSTRIES, INC.,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, SOUTHERN DIVISION

The Honorable Fred J. Nichol
Chief Judge

APPELLEE'S BRIEF

STATEMENT OF ISSUES

I. Whether the District Court erred when it held as a matter of law that the design guarantee created an unlimited express warranty.

Drier v. Perfection, Inc., ___S.D. ____, 259 N.W.2d 496 (1977).

S-C Industries v. American Hydroponics Systems, Inc., 468 F.2d 852 (5th Cir. 1972).

II. Whether the District Court erred when it held as a matter of law that the attempt to limit the express warranty to a period of six months was inoperative.

Associated Seed Growers v. Johnson, 297 S.W.2d 934 (Ark. 1957).

Beckmire v. Ristokrat Clay Prod. Co., 36 Ill. App. 3d, 343 N.E.2d 530 (1976).

Binkley Co. v. Teledyne Mid-America Corp., 333 F.Supp. 1183 (E.D.Mo. 1971) aff'd 460 F.2d 276 (8th Cir. 1972).

C & J Fertilizer, Inc. v. Allied Mutual Insurance Co., 227 N.W.2d 169 (Ia. 1975).

City of Sioux Falls v. Henry Carlson Co., ___ S.D. ___, 258 N.W.2d 676, 679 (1977).

Dobias v. Western Farmers Association, 6 Wash. App. 194, 491 P.2d 1346, 1350 (1971).

Drier v. Perfection, Inc., ___S.D. ___, 259 N.W.2d 496 (1977).

Farmers Mutual Automobile Insurance Co. v. Beshard, 80 S.D. 237, 238, 122 N.W.2d 86, 87 (1963).

Hauter v. Zogarts, 120 Cal. Rptr. 681, 534 P.2d 377, 386 (1975).

Henry v. W. S. Reichenbach & Son, Inc., 5 UCC Rep. 985 (C.P.Pa. 1968).

Overland Bond & Investment Corp. v. Howard, 9 Ill. App. 3rd 348, 292 N.E.2d 168, 174 (1972).

Pearson v. Franklin Laboratories, ___ S.D. ___, 254 N.W.2d 133 (1977).

Raymond-Dravo-Langenfelder v. Microdot, Inc., 425 F.Supp. 614 (D.C.Del. 1977).

S-C Industries v. American Hydroponics Systems, Inc., 468 F.2d 852 (5th Cir. 1972).

Swenson v. Chevron Chemical Co., ___ S.D. ___, 234 N.W.2d 38 (1975).

U.S. Fibres, Inc. v. Proctor & Schwartz, Inc., 509 F.2d 1043 (6th Cir. 1975).

Wilson Trading Corp. v. David Ferguson, LTD, 23 NYS2d 398, 244 N.E.2d 685 (1968).

Webster's New Twentieth Century Dictionary (1976).

J. White & R. Summers, Uniform Commercial Code §12-3 (1972).

III. Whether the District Court erred when it held as a matter of law that the attempt to limit the express warranty to defects discovered within six months was inoperative.

Neville Chemical Co. v. Union Carbide Corp., 294 F.Supp. 649 (W.D.Pa. 1968), aff'd in part and vac'd in part, 422 F.2d 1205 (3rd Cir.) Cert. Denied, 400 U.S. 826 (1970).

IV. Whether a more reasonable period of time should be substituted for the invalid six month provision. Although not raised at the Trial Court level, Dresser now seeks to invoke the statute of limitations as a defense and in substitution of its unreasonable contract provision.

Gardner v. Meyers, 491 F.2d 1184, 1190 (8th Cir. 1974).

Perry v. Augustine, 3 UCC Rep. 735 (Cppa 1965)

United States v. Masonry Contractors Association, 497 F.2d 871, 877 (6th Cir. 1974).

V. Whether the Trial Court erred when it held as a matter of law that the limitation of remedies provision failed its essential purpose.

Ehlerts v. Chrysler Motor Corp., ___ S.D. ____, 226 N.W.2d 157 (1975).

Earl M. Jorgensen Company v. Mark Construction, Inc., 540 P.2d 978, 986 (Hi. 1975);

Neville Chemical Company v. Union Carbide Corporation, 294 F.Supp. 649 (W.D.Pa. 1968), aff'd in part and vac'd in part, 422 F.2d 1205 (3rd Cir.) Cert. Denied, 400 U.S. 826 (1970).

S-C Industries v. American Hydroponics Systems, Inc., 468 F.2d 852 (5th Cir. 1972).

Wilson Trading Corp. v. David Ferguson, LTD., 23 NYS2d 398, 244 N.E.2d 685 (1968).

J. White & R. Summers, Uniform Commercial Code §12-3 (1972).

VI. Whether the jury's verdict is supported by the evidence.

Drier v. Perfection, Inc., ___ S.D. ____, 259 N.W.2d 496 (1977).

Griggs v. Firestone Tire & Rubber Co., 513 F.2d 851, 857 (8th Cir.) Cert. Denied, 423 U.S. 865 (1975).

Heisen v. Rodway, ___ S.D. ____, 247 N.W.2d 65 (1976).

Larson v. Meckling Fertilizer Co., ___ S.D. ____, 243 N.W.2d 167 (1976).

McCarty v. E. J. Korvette, Inc., 28 Md. App. 421, 347 A.2d 253 (1975).

Russ v. Ratliff, 538 F.2d 799, 804 (8th Cir. 1976), Cert. Denied, 429 U.S. 1041 (1977).

S-C Industries v. American Hydroponics Systems, Inc., 468 F.2d 852 (5th Cir. 1972).

Swenson v. Chevron Chemical Co., __ S.D. ___, 234 N.W.2d 38 (1975).

STATEMENT OF CASE

The Statement of Case set out in the Appellant's Brief is acceptable and will not be repeated here.

STATEMENT OF FACTS

On January 11, 1975, at 1:47 A.M., a 1,984 foot television tower, located approximately ten miles east of Sioux Falls, South Dakota, collapsed during a winter snowstorm. The tower was owned and operated by the Plaintiff, Community Television Services, Inc. (Community). It was designed and constructed by the Defendant, Dresser Industries, Inc. (Dresser) in 1968-1969. The tower, together with certain antennas and cables attached to it, was completely destroyed. In addition, one building beneath the tower was totally demolished and another was substantially damaged.

Express Warranty

In 1968, Community entered into an Agreement with Dresser for the planning, design, fabrication and erection of the tower (Ex. 26; A. 1363-1365). Dresser was also responsible for the installation of all equipment and antennas on top of the tower. In short, Dresser undertook the entire engineering and construction process for a completed broadcasting tower. The contract price was $387,000.00 (A. 1364).

The Agreement was evidenced by an order typewritten on a form furnished by Dresser. The order is nine pages long, containing, among other things, six pages of typewritten

detailed specifications (A. 1366-1374). Paragraph two of the specifications, entitled Design Wind Load, read as follows:

> 2. The tower shall be designed to resist a uniform wind load per drawing T-5172, Sheet S-1, 60 psf on flats. (Ex. 26; A. 1366).

This specification contemplated the construction of a tower which would withstand a wind pressure of sixty pounds psf (per square foot) on flat surfaces. It is undisputed that a wind pressure of sixty pounds psf on flat surfaces equals a wind velocity of not less than 120 miles per hour. Dresser's brochure confirms this fact (Ex. 1). Accordingly, the specification guaranteed that the tower was designed to safely withstand a maximum wind velocity of at least 120 miles per hour. Unfortunately, the design capacity of the tower proved inadequate. Dresser concedes that the tower failed and collapsed in a storm during which the wind velocity never exceeded the range of 70 to 80 miles per hour. (Appellant's Brief at 14.)

Throughout trial, Dresser insisted that the accumulation of ice and snow on the members of the tower, coupled with the high winds, subjected the tower to a load far in excess of the 60 psf warranty. The jury rejected Dresser's theory, and found that the tower simply could not withstand a maximum wind velocity of 120 mph as specified in the contracts. As noted by the District Court (A. 29):

> This fact was argued extensively to the jury be defendant. The jury apparently found that the presence of ice and snow on the tower at the time of collapse, if any, had been insufficient in amount to be a causal factor in the collapse.

Disclaimer, Modification of Express Warranty, and Limitation of Remedies

As noted above, the Agreement in question is nine pages long, with the final six pages containing the detailed specifications for the tower. Nowhere in the typewritten description portion of the Agreement is there any disclaimer, modification of warranties or limitation of remedies; nor is reference made to such terms. Likewise, no such disclaimers, modifications or limitations are made or referred to in the typewritten detailed specifications. Instead, Dresser seeks to invoke certain "Terms and Conditions of Sale" buried in small print among fourteen paragraphs and ten subparagraphs on the reverse side[1/] of its standardized form. The first enumerated paragraph contains language attempting to disclaim and supersede the aforementioned express warranty specification. Said paragraph states in pertinent part:

> [A]cceptance by Seller of Buyer's or other's specifications are understood to be only for the technical content thereof and any warranties or other

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1/ In Appellant Dresser's Appendix, this reverse side (A. 1363) is bound ahead of the face sheets of the printed form (A. 1364 & A. 1365). Also, the specifications pages (A. 1366-1374) are printed rather than photocopies. The printing is misleading in light of the fact the original pages were typewritten.

terms and conditions therein shall be of no force and effect...

Later, in the ninth enumerated paragraph, is a provision providing a six-month warranty for products and construction under the contract and limiting the Buyer's remedies for breach of warranty. That paragraph reads in full.

> 9. WARRANTY AND LIMITATION OF LIABILITY: Seller warrants, for a period of six months, that products of its own manufacture and any construction performed hereunder by the Seller shall meet the applicable specifications incorporated in this contract, and be free from defects in material and workmanship. Provided Buyer submits a claim in writing to Seller immediately upon its discovery and in any event within six (6) months after shipment if no construction is performed hereunder or within six (6) months after final acceptance by Buyer if construction work is performed (or within six months from notification of completion by Seller if Buyer wrongfully refuses or delays final acceptance), Seller shall, at Seller's sole option, repair, replace or refund an equitable portion of the purchase price of any product or work which Seller determines to have been defective or failed to meet applicable specifications. If construction work is not performed by Seller, then: (i) Buyer acknowledges that defects arising from improper or inadequate construction are not covered by this warranty, (ii) Buyer shall return the product, upon which any claim is based, f.o.b. Seller's factory for Seller's inspection and/or repair, and (iii) all repairs or replacement by Seller shall be f.o.b. Seller's factory. Items not manufactured by the Seller are warranted and guaranteed only to the extent and in the manner warranted and guaranteed to the Seller by the manufacturer of such items and them only to the extent the Seller is able to enforce such warranty of guaranty.

> Except for obligations expressly and specifically assumed under the other clauses of these Sales Terms, the foregoing is Seller's only warranty, obligation, and liability, under tort (including alleged negligence) contract or otherwise for or in connection with its products, work and services or use thereof. THE FOREGOING IS EXPRESSLY IN LIEU OF ALL OTHER WARRANTIES WHATSOEVER, EXPRESS, IMPLIED AND STATUTORY, INCLUDING, WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS. IT IS SPECIFICALLY UNDERSTOOD SELLER'S PRICE IS BASED UPON THE FOREGOING LIMITATION OF LIABILITY AND BUYER'S WAIVER OF ANY AND ALL CLAIMS FOR DAMAGES.

This provision, however, must be construed as an addition to the other warranties contained in the typewritten specifications of the contract. Otherwise, this provision would directly modify and unreasonably limit the typewritten specifications explicitly warranting, without limitation, the design capabilities of the tower.

The Contract Negotiations of the Parties

In 1965, the two local television stations in Sioux Falls, South Dakota, KELO and KSOO, decided jointly to erect a 2,000 foot television tower for the purpose of broadcasting the television signals from both stations. The Plaintiff herein, Community Television Services, Inc., was organized by the two stations to own and maintain the tower structure (A. 54). Community contacted RCA and GE with reference to acquiring an antenna suitable for use by both broadcasting stations. RCA was selected to provide the appropriate antenna (A. 126-127). In addition to furnishing the antenna, RCA was

requested to obtain quotations for the tower structure (A. 762-763). Pursuant to that direction, RCA solicited bids from the three tall-tower manufacturers located in the United States. As part of its solicitation of bids, RCA submitted certain information to each tower manufacturer, including the size and weight of all accessory equipment to be put on the tower and the required design wind loading for the tower in terms of wind pressure (A. 763-764). In the instant case, of course, RCA requested a wind load of 60 pounds per square foot on flat surfaces (A. 762-764). In response to the solicitations of RCA on behalf of Community, two representatives of Dresser, Bob McKinney, a salesman, and Pat Irwin, a field engineer, contacted officials of Community (A. 47-48). McKinney delivered certain brochures to Lee Heisel, Director of Engineering for one of the local television stations (A. 45, 49-50). On the second page of one brochure (Exhibit 1), the following caption appears below a picture of numerous Dresser towers:

> Some of the Dresser-Ideco towers... have been in service since the very first days of television. In the winter, loaded with ice and hammered repeatedly with gale force winds, these towers absorb some of the toughest punishment that towers take anywhere in the country...yet continue to give dependable uninterrupted service.

Later, on page fifteen, the same brochure states, "[p]roperly designed towers will safely withstand the maximum wind velocities and ice loads to which they are likely to be subjected."

It is further stated that a "60.5 pound tower" is designed to safely withstand an actual wind velocity of 120 miles per hour. These representations were discussed during the negotiation process and were relied upon by Community (A. 51). McKinney conceded that the brochures were used by him for such business purposes (A. 1006-1007). Dresser's proposal made explicit reference to the 60 pound designed wind load specification (A. 55-56). On the reverse side of the proposal supplied by Dresser, there appeared certain terms and conditions, including the disclaimers and limitations of warranties and remedies set out above. McKinney testified that these terms and conditions were reviewed with Heisel and Howard Ahrendt (A. 991-992). These latter individuals testified otherwise. Both men testified that there was no discussion about the terms and conditions contained in the fine print. In fact, they had no knowledge of the terms and conditions (A. 1212-1213, 1240-1241).

The Dresser proposal was accepted by Community, and upon completion of the tower structure by Dresser, it began operation on October 29, 1967 (A. 227-228). On June 22, 1968, the tower collapsed when an airplane hit and severed one of the guy cables supporting the tower (A. 54-55). Community immediately contacted Dresser in regard to the erection of a replacement tower as soon as possible (A. 61-62). Negotiations for the new tower lasted only about ten days (A. 62). The

primary discussion between the parties was the price increase. The replacement tower was to be a duplicate of the fallen one (A. 62-64, 274, 998-999). Some time during July, McKinney submitted the Dresser proposal, dated July 2, 1968, to Community. The specifications, dated July 3, 1968, and attached to the proposal, contained the same designed wind load specifications as the 1966 agreement (A. 134). This specification was specifically discussed during the short negotiation process (A. 1213). Dresser concedes, on the other hand, that the terms and conditions on the reverse side of its 1968 proposal were never brought to the attention of anyone at Community. Dresser's salesman, McKinney, so testified (A. 998-999). As further evidence, the first page of the order form is signed only by McKinney. It is readily apparent, however, that the signature line is meant for the Buyer. It would serve no purpose for the Seller to acknowledge his own terms and conditions. Nevertheless, Dresser must admit this unusual and meaningless practice here. (A. 1105-1106).

The Tower

The replacement tower began operation in May, 1969 (A. 274). It collapsed six and one-half years later, on January 11, 1975, during a winter storm.

The overall height of the tower plus television antenna was 1,984 feet (A. 49). There were 64 individual sections in the tower structure (A. 297). Each section was

a nine-foot triangular column and was 30 feet high, except the top section which was somewhat shorter. The sections were bolted together (A. 91-92). The tower was supported by 27 steel guy cables which spanned out to reinforced concrete anchors buried in the ground at a considerable distance from the tower (A. 299-300). The guys were attached to the tower at various intervals to insured a "plumb" (vertical) tower. At each anchor point, dampeners were attached to the guy cable for purposes of suppressing high frequency vibration and galloping in the cables (A. 85, 431-432).

Atop the tower was attached a 75-foot television antenna (A. 47). Community purchased the antenna in 1968 from RCA (A. 272,759) at a cost of $201,765.00 (A. 768). Dresser assumed the responsibility of installation of the 8,000 pound antenna atop the tower. The antenna was equipped with deicing equipment to protect it from the winter weather elements (A. 278-279, 779). If the deicer was not functioning properly and the antenna was suffering from severe icing conditions, an electronic signal was automatically activated in the transmitting building below the tower (A. 779).

Both the Dresser guyed tower and the RCA television antenna had an estimated useful life of fifty years (A. 515, 593, 763). Several towers constructed at the beginning of the television era remain in operation today (Ex. 1, page 1).

Both the tower and antenna were reduced to mere rubble

after the collapse. The salvage value was $1.00 (A. 121). In addition, one building below the tower was totally demolished and another was extensively damaged. The total loss sustained by Community was $1,385,001.61, as determined by the jury, or $1,274,631.60 by remittitur (A. 34-35).

Tower Inspection and Maintenance

It is undisputed that the tower was in satisfactory condition during the time in question and that the collapse was not caused by any inadequate repair or the lack of proper maintenance. The tower received a detailed, comprehensive inspection at six month intervals (A. 187). Its last such semi-annual inspection was on June 9, 1974, approximately seven months before the collapse (A. 178-180). The inspection revealed that the tower was in excellent condition (A. 1377). All guy cables were found in proper tension, thus insuring a plumb tower (A. 182-183). The guy cables and their fittings were in good condition (A. 183). Likewise, the anchors and dampeners were in good shape (A. 183, 186, 189-190). In short, the inspectors found absolutely nothing wrong with the tower or its component parts (A. 190).

In addition to the comprehensive inspection on June 9, 1974, the tower was examined during November, 1974, less than two months prior to the collapse (A. 191). At that time, the radiating element was replaced on the antenna deicer (A. 205). The workmen also carefully checked the tower for any loose

connections or damaged parts. No problems were found (A. 192-193).

The only actual repair made to the tower itself during the time in question, other than the replacement of light bulbs, was the retensioning of certain guy cables in 1971. The field engineer in charge of the retensioning project was Mark Pyron (A. 51). He was a field engineer with Dresser during the construction process of the tower and had investigated the condition of the guy cables at that time (A. 66). Between 1971 and January 11, 1975, the guy cables were checked on a regular basis and no further adjustments were necessary (A. 164). Accordingly, the tower had been adequately maintained and was in excellent condition at the time of the collapse.

This fact is further confirmed by the expert examination and evaluation of the tower members, guy cables and related parts after the collapse. Community introduced expert testimony at the trial to the effect that there had been no mechanical failure prior to the collapse; that is, the tower members, the guy cables, the anchors, the dampeners, and all other related parts were in proper working order and did not cause or initiate the collapse (A. 300-302, 378-379, 390, 414-416, 711-712). Dresser's expert, John K. Minasian, agreed (A. 1085). Simply put, the expert testimony revealed that the tower was in acceptable condition at the time of collapse. In fact,

Dresser has never even suggested or implied that the condition of the tower was a factor in the collapse.

Tower Failure

The tower collapsed at 1:47 A.M. on January 11, 1975, during a severe winter snowstorm (A. 239-241). The surface winds at the base of the tower were from the northwest (A. 549-550) at 43 miles per hour with gusts to 57 miles per hour (A. 548, 896). At the upper reaches of the tower, the winds aloft were from the northwest at 55 to 60 miles per hour with gusts in the range of 70 to 80 miles per hour (A. 579-580, 898-899). The temperature was 2 degrees below Fahrenheit (A. 544) and light snow was falling (A. 550-552).

The initial failure in the tower that caused the collapse occurred between guy levels 4 and 5 (A. 351-352, 426, 693-694), approximately 750 feet to 960 feet above ground level (A. 352-353, 396-397). Accordingly, the collapse started in the lower half of the 1,984 foot structure. The tower separated into two major portions. The top portion of the tower fell southeastward (A. 299-300) and the lower portion fell primarily northward (A. 308).

On January 13, 1975, two days after the collapse, Community officials notified Dresser (A. 96-97). Ernest Vance, responding on behalf of Dresser, simply stated: "I guess we'll have another lawsuit." (A. 97.)

Dresser's Theory of Collapse

In answer to the breach of warranty claim, Dresser

postulated that ice and snow accumulated on the tower members, thereby increasing the surface area exposed to the wind and subjecting the tower to a stress far in excess of the 60 psf express warranty. Dresser's theory, if correct, provided a complete defense to the breach of warranty cause of action.

Dresser's defense was based upon the testimony of three expert witnesses: two meteorologists and one civil structural engineer (A. 862, 939, 1032). The theory, as developed by Dresser's meteorologists, John Murray and Harold Orville, was that the upper portion of the tower was almost constantly imbedded in clouds for a period of approximately three days prior to the collapse (A. 900-901, 946). During this time, the supercooled liquid water droplets in the clouds crystallized and froze to the tower members (A. 901). This condition is commonly referred to as rime icing (A.902)2/ Murray stated that in his opinion, "anywhere from three to four to six inches, conservatively speaking, of rime ice [formulated] in different directions on this particular tower." (A. 913). Dresser's other expert, Minasian, a civil structural engineer, agreed: "The cause of the collapse was the

2/ Rime ice is a granular deposit of flaky, lightweight ice (A. 633-634, 797-798). Rime ice is formed by the instantaneous freezing of minute supercooled water droplets upon contact with the surface. It forms only on the windward side of an object and protrudes into the direction of the wind. Rime ice contains a large amount of air which makes it less adhesive than glare ice so that it blows off objects easily, especially if the wind is gusty or changes directions. Rime ice has the same appearance as frost in a freezer or refrigerator (A. 919-021).

...freak condition of icing, and loading of the upper two spans [i.e. upper fourth of tower]." (A. 1115). Minasian further stated that rime ice on the ground is visible to the human eye (A. 986).

An accumulation of three inches of rime ice on the upper fourth of the tower would amount to a volume of 3,091 cubic feet of ice or 23 dump truck loads or 2,900 bushels (A. 1221-1222). If there was a six inch accumulation, the volume, of course, would double: 6,182 cubic feet of ice or 46 dump truck loads of 5,800 bushels.

Dresser's theory, as explained by its experts, was in direct contradiction to the testimony of nine eye witnesses. No person who visited the tower site after the collapse saw any ice on the tower or anywhere else in the area, this during a time when the temperatures were constantly below freezing (A. 286-287). Lester Froke, an engineer with one of the local stations (A. 218-220), was inside one of the transmitter buildings beneath the tower at the time of collapse (A. 238-240). He has literally lived under broadcast towers for approximately 40 years and has observed them in all types of weather conditions (A. 227-228). He had seen rime ice both on the original tower erected in 1966 and on the one in question (A. 235-236). Following the collapse, he noticed "only a trace" of ice on a few tower members (A. 244). The ice was so thin that it could easily be lifted off with a fingernail

(A. 244). He saw no other ice on the tower members or in the area (A. 244-245, 248).

Scott Park arrived at the tower site shortly after 12:00 P.M. for the purpose of picking up Froke. He saw no ice in the area (A. 466). Likewise, Heisel and Max Pierce, both engineers for the local stations, visited the tower site on the day after the collapse (A. 72, 281). Both men were familiar with icing conditions on the tower (A. 76, 384). Both men inspected the tower wreckage in detail and saw no ice of any type (including rime ice) on the tower members or anywhere else (A. 76, 110, 282-286, 289).

Several disinterested witnesses also visited the tower site after the collapse. Among them was Paul Betzing, an independent tower contractor and repairman (A. 191). Betzing often encountered ice on towers during the course of his occupation (A. 197). His examination of the fallen tower and surrounding area revealed no ice (A. 197-198). In addition, two individuals seeking the salvage contract, Hammond Moody Yesda and Edward Pesicka, surveyed the ruin and saw no ice (A. 266-268).

Three days after the collapse, on January 14, 1975, Carroll Stone Kirkpatrick, an aerospace engineer employed by Haag Engineering Company, arrived in Sioux Falls at the request of Community to conduct a field inspection and study of the fallen tower (A. 399-401). He had been specifically

directed by his superior at Haag Engineering Company to search the entire area for ice of any kind (A. 401-402). He studied each segment of the collapsed tower and each anchor point. He also walked a considerable distance to the east and south of the tower (A. 401-402). Like those before him, he found no ice (A. 402). His investigation did reveal paint chips and flakes that had cracked off the tower during the collapse and had blown downwind (southeast) from the tower (A. 402). Yet, no ice (A. 402). During the course of his investigations of other towers that did collapse because of ice, Carroll Kirkpatrick noted that the ice was very visible on the tower debris, as well as on the ground downwind of the tower (A. 402-403).

Later in the week, Mary Jacquelyn Kirkpatrick, a mechanical engineer for Haag Engineering Company and the wife of Carroll Kirkpatrick (A. 296), arrived in Sioux Falls to help with the investigation. She and her husband spent three and a half days platting the location of every tower section on a master drawing. At no time did she notice any ice on the fallen tower or anywhere on the ground (A. 299). Dr. Ronald Nelson, Professor of Physics and Director of Aviation at Augustana College, Sioux Falls, South Dakota, also inspected the tower site for ice during this time period. He found none (A. 792-796).

Community's position that ice and snow played no part in the collapse of the tower was further supported by the

expert testimony of Kenneth R. Clark, formerly in charge of the National Weather Service at Sioux Falls, South Dakota (A. 537-538), and Clyde M. Hardy, a structural and design engineer for Haag Engineering Company (A. 679-680). Briefly stated, each expert testified that ice was not a factor in the tower failure (A. 665-670, 698).

Finally, Robert Wittrock, an instrument pilot with Sioux Falls Aviation, flew a charter flight to Minneapolis, Minnesota, leaving Sioux Falls at approximately 2:30 P.M. on January 10, 1975 (A. 1205-;206). He flew directly through the cloud mass in question and experienced no icing conditions (A. 1206-1207, 1209-1210). He testified that icing conditions must be reported by all pilots to the local flight service weather station (A. 1211). Dresser introduced no such icing reports for the time period in question.

Dresser's experts did attempt to explain away the absence of any ice inthe area by surmising that the collapse caused the ice to be broken off and carried away by the wind (A. 916-919, 958, 972-973). In light of the mass of ice - 23 to 46 dump truck loads - involved under Dresser's theory, however, this seems very unlikely. Moreover, meteorologist Murray admitted that the rime ice on the tower at the time of collapse, if any, should have been found in the same area as the paint ships found by Carroll Kirkpatrick (A. 921-922).

Summary

Dresser's defense to the tower failure was two-fold:

First, Dresser argued that its disclaimer, modification of warranty and limitation of remedies clauses buried on the back side of its order form insulated it from any liability; second, Dresser argued that the accumulation of ice and snow on the tower members subjected the tower to a stress far in excess of the 60 psf warranty. The District Court rejected the first argument as an unreasonable modification of an express warranty and the jury rejected the second argument of the phantom ice and snow.

ARGUMENT

Dresser designed, fabricated and erected the tower in question. During the negotiation process for the tower contract, in its brochure and in the final order form, Dresser explicitly guaranteed that the subject tower was designed to safely withstand a horizontal wind pressure of 60 psf on flat surfaces. This is equivalent to an actual wind velocity of approximately 120 miles per hour. The District Court properly held as a matter of law that this design guarantee created an express warranty. The tower design proved inadequate. It collapsed under a wind velocity of approximately 80 miles per hour - only 66% of its guaranteed design capability.

Dresser's theory of defense throughout trial was that the accumulation of ice and snow on the tower subjected it to a wind pressure in excess of the 60 psf warranty. By its verdict, the jury rejected this defense and found that

Community had proven by a preponderance of the evidence a breach of the warranty provision by Dresser. The jury assessed damages in the amount of $1,385,001.61. Said amount was reduced by remittur to $1,274,631.60. Dresser does not dispute the computation or amount of proven damages.

Dresser raises two arguments on this appeal: (1) The Trial Court erred in finding that the limitation of warranty and remedy provisions contained on the reverse side of its standardized form were inoperative; and (2) the jury verdict that Dresser breached its express warranty is not supported by the evidence.

Community respectfully submits that both arguments are without merit. The District Court specifically rejected Dresser's first argument. Great weight should be afforded to the District Court's construction of the applicable state law. See e.g., Jamestown Farmers Elevator, Inc. v. General Mills, 552 F.2d 1285 (8th Cir. 1977). Dresser's second argument ignores the substantial evidence in the record to support all the essential elements of the breach of warranty claim. Since Community prevailed on this theory at trial, this Court must consider the evidence and all permissible inferences which can be derived from that evidence in the light most favorable to Community and all conflicts in the evidence must be resolved in its favor. See, e.g., Northern v. McGraw-Edison Co., 542 F.2d 1336 (8th Cir. 1976).

Both issues raised on this appeal by Dresser must be reviewed in light of the express warranty provision. Accordingly, Community will address these issues in the following terms: I - the express warranty; II - the purported disclaimer and modification of that warranty; III - the limitation of remedy; and IV - the jury verdict.

I.

THE DESIGNED WIND LOAD SPECIFICATION CREATED AN EXPRESS WARRANTY.

It is undisputed that certain information and specifications for the tower were submitted to Dresser on behalf of Community during the solicitation of bids for the 1966 tower. Included was a specification designating a wind load capacity for the tower of 60 psf on flat surfaces. In response to the solicitation of bids, a Dresser salesman contacted Community officials. He gave them a brochure that stated a Dresser 60-pound tower was designed to safely withstand a horizontal wind pressure of 60 psf on flat surfaces. The brochure further stated that a wind pressure of 60.5 psf on flat surfaces is equivalent to an actual wind velocity of 120 miles per hour (Ex. 1, page 15). These facts were discussed in detail during the negotiation process (A. 51).

The specification was explicitly typewritten into the Dresser order. It reads:

> 2. Designed Wind Load: The tower shall be designed to resist a uniform wind load per drawing T-5172 Sheet-1, 60 psf on flats.

The District Court held as a matter of law that the 60 psf specification, as amplified in the brochure of Dresser, created an express warranty that the tower would withstand a wind velocity of approximately 120 miles per hour. This warranty was subsequently breached when the tower collapsed under the force of an 80 mile per hour wind.

SDCL 57-4-27 provides that any description of a product which is part of the basis of the bargain creates an express warranty that the product will conform to that description.

In S-C Industries v. American Hydroponics System, Inc., 468 F.2d 852 (5th Cir. 1972), the Court recognized and gave effect to technical specifications very similar to the ones herein. The seller-manufacturer gave a set of plans for a greenhouse to the buyer prior to the actual purchase. The plans contained a specification that the steel truss for the greenhouse would withstand a vertical load of "20 PSF Snowload, 16 PSF Windload." The greenhouse collapsed and suit was brought against the seller for breach of express warranty. The Court held that the specification was an express warranty.

> Technical specifications may constitute a warranty, even to the extent of displacing the warranties created by inconsistent samples, models, or general language of description. [UCC 2-317] [The seller's] contention that this specification could not constitute a warranty is without merit.

...

> We agree with the court below that the specifications created an express warranty that the structure as a unit would withstand a vertical load of 20 pounds per square foot. Since the court found as a fact that the collapse of the structure was a result of its weakening under a load of less than 20 pounds per square foot, we also agree with the court's conclusion that there was a breach of the express warranty. 468 F.2d at 854-855.

The South Dakota Supreme Court has also held that statements describing the specific capacity of a product constitute express warranties. Drier v. Perfection, Inc., ___ S.D. ___, 259 N.W.2d 496 (1977).

It is also important to remember that the design warranty herein was first given in the Dresser brochure. The brochure was an integral part of the sales transaction; it explained the meaning of the 60 psf specification in detail. Under these circumstances, the statements in the brochure also created express warranties. "The law is clear that express warranties may be made in advertisements, pamphlets or brochures." Drier v. Perfection, Inc., supra, ___ S.D. at ____, 259 N.W.2d at 503.

On this appeal Dresser now concedes that the specification in question created an express warranty as a matter of law. Appellant's Brief at 20. Presumably Dresser's position is the same with reference to the statements in its brochure.

II.

THE PROVISIONS PURPORTING TO DISCLAIM AND MODIFY THE EXPRESS WARRANTY ARE INOPERATIVE.

The express warranty guaranteeing that the tower was designed to safely withstand a wind velocity of 120 miles per hour was the subject of extensive discussion between the parties. It was explicitly set out in the Dresser brochure and in the typewritten specifications for the tower. The warranty contained no limitations. Also, no disclaimer or limitation of warranty was contained elsewhere in the specifications or in the Dresser brochure. Nor is there any reference to such conditions. Rather, the purported printed disclaimer and limitation of warranty appears on the reverse side of a standardized order form supplied by Dresser. On its front side, the order form consists of typewritten matter. It is readily apparent that the typewritten matter was "bargained for" by the parties during the negotiation process. No disclaimer or limitation of warranty provision is contained in the typewritten items. At the bottom of the form mention is made to the terms and conditions of sale printed on the back side of the order form. Right below said reference there appears a signature line for the buyer, thus showing that the terms and conditions have been brought to the buyer's attention and discussed with him. In the instant case, however, no signature appears on behalf of Community.

The reverse side of the Dresser sales order form is a

solid mass of very fine print from top to bottom divided into two columns by a small center space. It sets forth in block, boiler-plate form, fourteen numbered and itemized terms, the last of which contains ten subparagraphs. Two signature lines appear at the bottom.

The printed material on the reverse side of the order form, among other things, contains a purported disclaimer provision in Paragraph 1.

> [S]pecifications are understood to be only for the technical content thereof and any warranties or other terms and conditions therein shall be of no force and effect.

Dresser admits, however, that the 60 psf design specification does in fact constitute an express warranty. It follows that the inconsistent disclaimer language is inoperative under SDCL 57-4-34. Dresser implicitly concedes this fact, as it must, on this appeal.

However, Dresser seeks to invoke a limitation of warranty provision in Paragraph 9. The Appellant's Brief divides Paragraph 9 (hereinafter Item No. 9) into three subparts: Six-month warranty limitation, six-month defect discovery provision, and limitation of remedies provision. For convenience and clarity, this same outline will be followed below.

A. Six-Month Warranty Limitation.

The limited warranty contained in Item No. 9 should not be construed as limiting the express design warranty;

rather, it should be treated as an additional warranty extending to materials and labor furnished under the contract.

In S-C Industries v. American Hydroponics Systems, Inc., supra, 468 F.2d 852, the Court was confronted with a similar situation. As noted earlier, the seller had furnished design specifications for a greenhouse to the buyer. Later, at the time of sale, the seller gave the buyer a printed special warranty form. The special warranty stated that the merchandise would be free from defects in material and workmanship for a period of one year. It further provided that this express warranty superseded all other warranties and representations. The seller argued that the special warranty was sufficient to supersede all other warranties, including the design specification. The Court of Appeals for the Fifth Circuit rejected this argument.

> The general language of that special warranty does not mention the written express warranty which [seller] had given [buyer]. The only reasonable interpretation that can be placed on this special warranty in light of the prior specific warranty, is that it applies only to any defects which might be found to exist in the various components and other materials which [seller] sold. Thus, while a special warranty form provided the exclusive remedy should any component be defective, it did not supersede the specific express warranty which extended to the design capability of nondefective structural members intended to perform as an integral part of the greenhouse building. 468 F.2d at 855.

Like in S-C Industries, the limited six-month warranty herein does not make definite reference to the specific designed warranty. The most reasonable interpretation of Item No. 9 is that the component parts of the tower will meet contract specifications and will be nondefective. The clause speaks of products; no mention is made of the design wind capacity of the tower itself. As in S-C Industries, the general six-month warranty clause must be construed to apply to only defective component parts of the tower. It cannot supersede or displace the express warranty extending to the design capability of a nondefective, properly constructed tower.

The boiler-plate, six-month warranty provision on the reverse side of Dresser's form, is ambiguous at best. Does it pertain only to the seller's specifications in light of the terminology contained in Paragraph 1, does it pertain to the design specifications statements made in the Dresser brochure, does it mean that the component parts of the tower will conform to their specifications, does it mean that the specifications themselves will not be defective, or does it mean all of the above? This author would simply construe the provision to mean that the component parts of the tower would meet the applicable specifications. The design of the tower, on the other hand, is quite a different matter. The actual design capability of the tower, if all component parts meet their specifications are not defective, should fall outside

the scope of the limited warranty provision.

The above noted ambiguities, of course, must be resolved against the maker of the contract.

> [I]t must be remembered that where an ambiguous contract exists, it should be interpreted most strongly against one who drafted the contract and caused the uncertainty to exist. City of Sioux Falls v. Henry Carlson Co., ___ S.D. ___, 258 N.W.2d 676, 679 (1977).

Likewise, "[d]isclaimers of warranty are to be strictly construed against the seller." Pearson v. Franklin Laboratories, ___ S.D. ___, 254 N.W.2d 133 (1977). See also Swenson v. Chevron Chemical Co., ___ S.D. ___, 234 N.W.2d 38 (1975). If the purported disclaimer is ambiguous, it is ineffective. Pearson v. Franklin Laboratories, supra, ___ S.D. at ____, 254 N.W.2d at 142.

The six month limitation of warranties is inoperative in light of the express warranty of design capability.

If this Court concludes that the six-month warranty provision does in fact apply to the 60 psf design warranty, then the limitation was an unreasonable one as a matter of law and therefore inoperative. SDCL 57-4-34 provides:

> Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of chapter 57-3 on parol or extrinsic evidence (§57-3-4) negation or limitation is inoperative to the extent that such construction is unreasonable.

The clear meaning of SDCL 57-4-34 is to exclude the unreasonable negation or the unreasonable limitation of express warranties. The statute "seeks to protect a buyer from unexpecte and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty..." UCC 2-316, Comments 1. See also J. White & R. Summers, Uniform Commercial Code §12-3 (1972).

Reviewing the facts herein, Dresser expressly guaranteed, without limitation, that the tower was designed to withstand a wind velocity of approximately 120 miles per hour. This express warranty in the typewritten provision of the specifications cannot be modified by an unreasonable "negation or limitation" appearing in other boiler-plate, printed portions of the order form. There is no doubt that the clause limiting the design warranty to a period of six months was a limitation of an express warranty within the meaning of SDCL 57-4-34. Limit is defined as:

> The point, line or edge where something ends or must end; the boundary or border beyond which something ceases to be or to be possible. Webster's New Twentieth Century Dictionary (1976).

The term limit implies a point in space for time, beyond which a person or thing is not permitted to go. In the instant case of course, it is obvious that the six-month warranty clause severely restricted and limited the express warranty of design. Applying SDCL 57-4-34, the only remaining question is

whether or not the limitation was a reasonable one. In this regard, the District Court found that the six-month limitation was a "manifestly unreasonable" one. The Court noted that the express warranty of design capacity was an unlimited one in both scope and duration. The warranty applied to a structure with an estimated useful life of fifty years. Thus, the six-month limitation had the effect of limiting the design capability of the tower to less than 1/2 of 1% of its useful life. Such an attempt to so severely modify and restrict an unlimited, design warranty is clearly unreasonable. It reduces a "bargained for" express warranty to mere frivolity.

In Wilson Trading Corp. v. David Ferguson, LTD. 23 NYS2d 398, 244 N.E.2d 685 (1968), the sales contract created an express warranty of merchantability but another clause disallowed all claims by the buyer after the goods had been processed or more than ten days after receipt of the goods. The Court held that where a contract creates an unlimited, express warranty and indirectly attempts to modify that warranty by a short-time limitation, the language creating the express warranty prevails.

> The contract expressly creates an unlimited express warranty of merchantability while in a separate clause purports to indirectly modify the warranty without expressly mentioning the word merchantability. Under these circumstances, the language creating the unlimited express warranty must prevail over the time limitation insofar as the latter

> modifies the warranty. 23 N.Y.2d at ___, 244 N.E.2d at 689.

As in Wilson Trading, the express warranty of design capability herein must prevail over the indirect attempt to modify it by an unreasonable time limitation.

Numerous courts have held that words of modification or limitation must yield to provisions of express warranty.

> No warranty, express or implied, can be modified or disclaimed unless a seller clearly limits his liability...
>
> Because a disclaimer or modification is inconsistent with an express warranty, words of disclaimer or modification give way to words of warranty unless some clear agreement between the parties dictate a contrary relationship (Citations omitted). At the very least, [UCC 2-316] allows limitation of warranties only by means of words that clearly communicate that a particular risk falls on the buyer. Hauter v. Zogarts, 120 Cal. Rptr. 681, ___, 534 P.2d 377, 386 (1975).
>
> See, e.g., Auto-Teria, Inc. v. Ahern, 352 N.E.2d 774 (Ind. 1976); Chemco Industrial Applicators, Inc. v. E. I. DuPont, 336 F.Supp. 278 (E.D.Mo. 1973); Valmont-Pacific v. Kelley, 94 Idaho 373, 487 P.2d 1127 (1971); Admiral Oasis Hotel Corp. v. Home Gas Industries, 68 Ill. App. 2d 297, 216 N.E.2d 282 (1968); Beech Aircraft v. Flexible Tubing Corp., 270 F.Supp. 548, (D.C. Conn. 1967); Berk v. Gordon Johnson Co., 232 F.Supp. 682 (E.D. Mich. 1964).

Moreover, "[p]rinted disclaimers of warranties in form contracts are not favored by the courts and should be strictly construed against the seller." Overland Bond & Investment Corp. v. Howard, 9 Ill. App. 2rd 348, 292 N.E.2d 168, 174

(1972). Such terms are "ineffectual unless explicitly negotiated between the buyer and seller and set forth with particularity showing the particular qualities and characteristics of fitness which are being disclaimed." Dobias v. Western Farmers Association, 6 Wash. App. 194, 491 P.2d 1346, 1350 (1971).

Like the above courts, the South Dakota Supreme Court has evidenced a strong distaste for any type of modification or limitation of an express warranty. "[A]ny words which limit the express warranty...are inoperative. Drier v. Perfection, Inc., supra, ___ S.D. at ____, 259 N.W.2d at 503 See also Pearson v. Franklin Laboratories, Inc., supra, ___ S.D. ____, 254 N.W.2d 133. Here, of course, there are words which purport to limit an express warranty.

In addition to the inconsistency between the express warranty of design capability and the limitation imposed thereon, the facts and circumstances surrounding the transaction in question are also relevant in determining the reasonableness of the limitation.

> Under the language of Comment 1 to §2-316 the seller could introduce evidence that the parties had specifically bargained over the disclaimer clause. If such evidence were convincing, a court could try to find some reasonable construction of the contract that harmonized the two terms. J. White & R. Summers, supra, at 352 n.13.

Here, Dresser failed to prove that the parties had in fact bargained for the six-month limitation clause. The only two

officials who negotiated the contract on behalf of Community, Heisel and Ahrendt, testified that the fine print on the back side of the Dresser standardized form was never discussed and that they had no knowledge of the terms and conditions, including the limitation of warranty provision (A. 1212-1213, 1240-1241). This testimony is supported by the fact that no one on behalf of Community acknowledged the terms and conditions by signing the front side of the order form. Dresser's salesman, McKinney, conceded that no mention of the warranty limitation was brought to the attention of Community officials during negotiation of the 1968 contract (A. 999). In contrast, the 60 psf design warranty was specifically discussed (A. 1213).

> [I]f a warranty was actually made during the negotiations for the purchase of [goods], and not withdrawn or modified, it should be given effect, irrespective of the printed disclaimer. Associated Seed Growers v. Johnson, 297 S.W.2d 934, 937 (Ark. 1957). See, e.g., Gray v. Gurney Seed & Nursery Co., 62 S.D. 97, 252 N.W. 3 (1933).

Finally, the Dresser brochure also contained the express warranty in question without any reference to a limitation of scope or duration. If Dresser intended to severely limit the brochure warranty by fine print in its order form, the obligations of good faith and reasonableness under the UCC required it to bring the limitation to the attention of Community officials. See SDCL 57-1-5.

The general rules of law which supplement the provisions

of the UCC and corollary South Dakota Statutes favor handwritten and typewritten provisions over inconsistent or ambiguous printed provisions.

> The rule is well settled that where part of a contract is written or typed and part is printed, and the written or typed and the printed parts are apparently inconsistent or there is reasonable doubt as to the sense and meaning of the whole, the words in writing or typing will control. The reason greater effect is given to the written or typed part of an agreement than to the printed part of it, if they are inconsistent, is that the written or typed words are immediate language in terms selected by the parties themselves for the expression of their meaning, while the printed form is intended for general use without reference to particular objects and aims. 17 AmJur2d, Contracts, §271 at 679. See, e.g. National Heater Co., Inc. v. Corrigan Co., 482 F.2d 87, (8th Cir. 1973);

See also Henry v. W. S. Reichenbach & Son, Inc. 5 UCC Rep. 985 (C.P.Pa. 1968); 3 A. Corbin, Corbin on Contracts §548 at 181-183 (1960). Compare U.S. Fibres, Inc. v. Proctor & Schwartz, Inc., 509 F.2d 1043 (6th Cir. 1975), in which the typewritten portion of the contract contained a disclaimer immediately before the description of the product sold and a statement that the company's standard warranty outlined later in the contract also applied.

The contemporary distaste for the boiler-plate, fine print provisions contained in a standardized form was recently discussed in C & J Fertilizer, Inc. v. Allied Mutual Insurance Co., 227 N.W.2d 169 (Ia. 1975). Quoting Professor Llewellyn,

the Court suggested:

> Instead of thinking about "assent" to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms. The fine print which has not been read has no business to cut under the reasonable meaning of those dickered terms which constitute the dominant and only real expression of agreement, but much of it commonly belongs in. 227 N.W.2d at 175.

The South Dakota Supreme Court has also recognized the too often effect of boiler-plate, fine print provisions on the back side of agreements. "The front page giveth, but the back page taketh away." Farmers Mutual Automobile Insurance Co. v. Beshard, 80 S.D. 237, 238, 122 N.W.2d 86, 87 (1963). More recently, the Supreme Court has stressed that a manufacturer should not avoid responsibility for the ineffectiveness of a product. The Court questioned,

> [W]hether or not public policy should permit the commercial enterprise to produce a product, advertise it, and place it on the market making representations that the product is designed to serve one particular purpose, and then totally avoid any and all responsibility on its part, should the product fail to be suitable for the purpose it was intended and presented to serve. Swenson v. Chevron Chemical Co., supra, ___ S.D. at ___, 234 N.W.2d at 42.

In light of the strong position espoused by the Supreme Court of South Dakota and other courts against any and all limitations of express warranty and the contemporary trend away from the unbargained for, boiler-plate terms of standardized forms, as well as the explicit language of SDCL 57-4-34, the six-month limitation of the express warranty of design capability herein should be held inoperative as unreasonable under the circumstances presented.

The cases cited in Appellant's Brief are inapposite to the instant case. Dresser does not specifically address the issue of whether or not the six-month limitation is inconsistent with the design warranty under the terms of SDCL 57-4-34. Appellant's Brief, however, does cite three cases in support of the validity of the six-month limitation clause. Beckmire v. Ristokrat Clay Prod. Co., 36 Ill. App. 3d, 343 N.E.2d 530 (1976); Binkley Co. v. Teledyne Mid-America Corp., 333 F.Supp. 1183 (E.D.Mo. 1971) aff'd 460 F.2d 276 (8th Cir. 1972); Raymond-Dravo-Langenfelder v. Microdot, Inc., 425 F.Supp. 614 (D.C.Del. 1977). These cases do not involve the modification of an express warranty. In each case, the sole issue before the Court was the statute of limitations and in each case the Court held that the action was barred by the applicable statute of limitations. This issue has never been raised by Dresser in these proceedings.

Dresser also argues that the six-month provision

"expanded, rather than limited, the rights available to Community under the Code." Appellant's Brief at 23. Dresser is mistaken. Simply put, Dresser was not obligated to give any express warranty to Community. Once an express warranty was given, however, Dresser cannot modify or negate the terms of the warranty by imposing an unreasonable time limitation.

B. Six Month Discovery Limitation.

Item No. 9 in the Dresser form contained yet another limitation. The limited six-month warranty was valid only if the buyer submitted a claim to Dresser within six months after construction of the tower. This additional proviso merely pyramids another limitation upon the 60 psf design warranty. Thus, the 60 psf design warranty is modified by way of both the six-month warranty limitation and the six-month discovery limitation. Dresser admits that this latter provision has a "limiting effect." Appellant's Brief at 27. Dresser further notes that the provision governs discovery of defects in the tower structure. Here, however, the component parts of the tower met applicable specifications; only the tower design proved defective. Again, this is outside the scope of the warranty limitation.

The effect of both limitations - warranty and discovery - is the same. Both provisions are an attempt by Dresser to exclude express warranties, including the 60 psf design capability, by means of a contractual provision elinimating all buyer's

remedies within an unreasonably short period of time. In one clause the express warranty is subjected to an unreasonably short duration while in the other it is subjected to an unreasonably short period of discovery of breach. Thus, the six-month defect discovery provision must fail for the same reasons as discussed above.

In Neville Chemical Co. v. Union Carbide Corp., 294 F.Supp. 649 (W.D.Pa. 1968), aff'd in part and vac'd in part, 422 F.2d 1205 (3rd Cir.) cert. denied, 400 U.S. 826 (1970), the plaintiff discovered certain latent defects in resins purchased from the defendant. The defendant argued that certain disclaimers and time limitation provisions contained in its sales form agreement with plaintiff relieved it from any warranty obligations. The time limitation provided that plaintiff waived all claims unless notice was given to defendant within fifteen days of delivery. The District Court found the fifteen day time limitation "manifestly unreasonable" and unvalid under UCC 1-204. The Court noted:

> A time limitation which renders warranties ineffective as to latent defects not discoverable within the time limitation is manifestly unreasonable. 294 F.Supp. at 655.

The Court of Appeals for the Third Circuit affirmed.

> The first provision on which Carbide relies to bar its liability is the fifteen day notice requirement. This requirement is manifestly unreasonable if it is construed to require that notice be given of latent defects which

> would not be discoverable until after the time specified has lapsed... The same result would follow under the Uniform Commercial Code. The Trial Court decided that the notice requirement was ineffective under Section 1-204(1) of the Uniform Commercial Code which states that, "Whenever this Act requires any action to be taken within a reasonable time, any time which is not manifestly unreasonable may be fixed by agreement." Just as a seller of tulip bulbs from Holland could not bar claims against it for defective bulbs by requiring notice before the bulbs would normally bloom, Vanderberg & Sons, N.V. v. Siter, 204 A.2d 494 (1964), Carbide could not require notice of defect in its chemical products at a point in time which it was impossible to discover the defect. 422 F.2d at 1217-1218. See, e.g., Weisz v. Tarke-Bernet Galleries, Inc., ___ N.Y.2d ____, 325 NYS2d 576 (1971); Wilson Trading Co. v. David Ferguson, LTD., supra, 23 N.Y.2d 398, 297 NYS2d 108.

The Appellant's Brief attempts at length to distinguish and explain away the holding of Neville. While it is true, as argued by Dresser, that Neville also involved the issue of negligence, the Court expressly based its holding on the latent defect and the manifestly unreasonable time limitation of giving notice to the seller under UCC 1-204. The latent defect, not the question of negligence, was controlling. It was noted that, "The defect in the material was not only latent but was not discoverable by ordinary inspection and testing." 294 F.Supp at 655. The same situation exists here - the defective tower design was latent and

not discoverable by ordinary inspection. As in Neville, the evidence at trial clearly showed that there was no reason to suspect the defective design until the tower collapsed under a wind velocity of only two-thirds of its design capability.

Dresser advances two propositions in support of its six-month defective discovery limitation. First, Dresser cites the commercial context of the agreement and the comparable bargaining powers of the parties. To suggest the two local television stations which comprise Community possess equal bargaining power with Dresser, a conglomerate, industrial corporation listed on the New York Stock Exchange, ignores reality. Community has no expertise in the field of tall tower design and was at the mercy of Dresser. Also, the boiler-plate format of the warranty limitations clearly shows that the terms were not "bargained for." In any event, the test is simply whether the six-month defect discovery provision is inconsistent with the unlimited 60 psf design warranty.

Second, Dresser argues that the six-month maintenance schedule for the tower demonstrates a need for the six-month defect discovery limitation. Accepting Dresser's argument that the two provisions are "integrally related," this is further evidence that the warranty limitations were intended to apply to the component parts of the tower but not to the tower design. The reason being that inspection of the tower would

reveal defective workmanship and defective parts, but it would not reveal a defective design. This is further evidence of the ambiguity of the boiler-plate provision.

In summary, SDCL 57-4-34 clearly prohibits a seller from disclaiming an express warranty. Likewise, a seller should not be allowed to accomplish this same result by excluding all a buyer's remedies through a contractual provision limiting the time for notifying the seller of latent defects not discoverable within a reasonable time. Parties are free, no doubt, to make their own bargain as they wish.

> But in determining what they have agreed upon, good faith is a factor and consideration should be given to the fact that the probability is small that a real price is intended to be exchanged for a pseudo-obligation. UCC 2-313, Comment 4.

Under the circumstances presented herein, it would be repugnant to the concepts of fairness and reasonableness to hold that the "bargained for" express warranty of Dresser could be negated indirectly by the warranty limitation provisions buried on the reverse of a standardized form.

C. The Substitute of a Reasonable Warranty Period for the Unreasonable Six-Month Period.

Dresser advocates that the Trial Court should have replaced the invalid six-month limitation with a more reasonable provision. This argument was never raised at the Trial Court level. "It is a well-established rule in this Circuit that defenses not raised or litigated in the Trial Court cannot

be urged for the first time on appeal." Gardner v. Meyers, 491 F.2d 1184, 1190 (8th Cir. 1974). Dresser is actually requesting this Court to invoke the four year statute of limitation provision contained in SDCL 57-8-61. The statute of limitations is an affirmative defense that must be set forth in the pleadings. Fed. R. Civ. Pro. 8(c). Since Dresser did not assert the statute of limitations defense in its Answer (A. 9-11), it cannot now be raised on appeal. United States v. Masonry Contractors Association, 497 F.2d 871, 877 (6th Cir. 1974). Moreover, the four year limitation would not be a bar to the instant case. See, e.g. Perry v. Augustine, 3 UCC Rep. 735 (C.P.Pa 1965) (Seller's warranty that system would "be able to heat at 75° inside at a -20° outside temp." extended to future performance of goods under UCC 2-725(2)).

III.

THE LIMITATION OF REMEDY CLAUSE IS INOPERATIVE.

Dresser next urges that recovery for the breach of the 60 psf design warranty should be limited to the purchase price of the tower. Item No. 9 stated in the event of a breach of the limited six-month warranty and if the six-month defect discovery provision was satisfied:

> Seller shall, at Seller's sole option, repair, replace or refund an equitable portion of the purchase price of any product or work which Seller determines to have been defective or failed to meet applicable specifications.

In the instant case, Dresser has determined that the tower was not defective and has afforded none of the above remedies to Community. Nevertheless, Dresser still attempts to shield itself behind the clause.

Contrary to the assertion of Dresser, this limited remedy provision is a part of the limited six-month warranty. Since the express warranty of tower design falls outside the scope of the limited six-month warranty, it also is not subject to the remedy limitation. S-C Industries v. American Hydroponics Systems, Inc., supra, 468 F.2d at 855.

The limited remedy also fails of its essential purpose under SDCL 57-8-50. Comment 1 of UCC 2-719 explains:

> [I]t is of the very essence of a sales contract that at least minimum adequate remedies be available. If the parties intend to conclude a contract for sale within this Article they must accept the legal consequences that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract...[W]here an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Article.

The purpose of SDCL 57-8-52 is to afford an adequate remedy in "novel circumstances not contemplated by the parties". J. White & R. Summers, supra, at 380. See also Ehlerts v. Chrysler Motor Corp., ___ S.D. ____, 226 N.W.2d 157 (1975). Here, the total collapse and destruction of the entire tower

was surely not within the contemplation of the parties. Like the limited six-month warranty, the limited remedy was obviously intended to cover a situation where part of the tower was discovered to be defective upon inspection. In such a case, replacement or repair of the part or an equitable refund would afford an adequate remedy to Community. When the design of the tower itself proved inadequate and the subsequent collapse destroyed not only the tower but also a $200,000-plus antenna attached thereto and the buildings below, then such a limited remedy is far below the acceptable minimum under SDCL 57-8-52. See Earl M. Jorgensen Company v. Mark Construction, Inc., 540 P.2d 978, 986 (Hawaii 1975); Neville Chemical Company v. Union Carbide Corporation, supra, 294 F.Supp. 649; Wilson Trading Corp. v. David Ferguson, LTD., supra, 23 N.Y.2d 398, 297 NYS2d 108.

IV.

THE JURY VERDICT THAT DRESSER BREACHED ITS EXPRESS WARRANTY OF DESIGN CAPABILITY IS FULLY SUPPORTED BY THE EVIDENCE.

In essence Dresser contends that a judgment should be entered in its favor notwithstanding the verdict. Dresser's burden in this regard is a heavy one. An Appellate Court may not substitute its view of the facts for that of the trier of fact unless it is in a position to find that reasonable minds, viewing evidence in the light most favorable to the prevailing party, could only have found contrary to the trier of fact. Russ v. Ratliff, 538 F.2d 799, 804 (8th Cir.

1976); cert. denied, 429 U.S. 1041 (1977). See also Griggs v. Firestone Tire & Rubber Co., 513 F.2d 851, 857 (8th Cir.) cert. denied, 423 U.S. 865 (1975). The standard in South Dakota is the same. Heisen v. Rodway, __ S.D. ____, 247 N.W.2d 65 (1976). Viewed in this light, there is ample evidence to support the verdict of the jury.

The Appellant's Brief seriously misconstrues the concept of express warranty liability under the UCC. To prevail under its theory of breach of express warranty, Community had to prove by a preponderance of the evidence, among other things, the following essential elements: (1) that Dresser made an express warranty; (2) that the tower failed to comply with the express warranty; (3) that Community's loss was proximately caused by that failure. (A. 1332-1333). See, e.g., Larson v. Meckling Fertilizer Co., ___ S.D. ___, 243 N.W.2d 167 (1976); Swenson v. Chevron Chemical Co., ___ S.D. ___, 234 N.W.2d 38 (1975). Community clearly fulfilled each of these elements. First, Dresser admits that it guaranteed the tower was designed to safely withstand a maximum wind velocity of 120 miles per hour. Second, the physical fact that the tower collapsed under an 80 mile an hour wind is strong evidence that the tower failed to comply with the express warranty. Third, there is no doubt that Community suffered a loss by the failure.

Dresser incorrectly assumes that a "defect" (i.e. something wrong) with the product had to exist at the time of

sale. In a breach of express warranty case, the defect is the failure to fulfill the express warranty.

> [E]ven a properly made or perfectly made product may be regarded as defective. Thus, in an action for injuries from breach of an express warranty, the test of defectiveness is whether the product performs in accordance with the express warranty given...McCarty v. E. J. Korvette, Inc., 28 Md. App. 421, ___, 347 A.2d 253, 263-264 (1975) (footnotes throught text omitted).

Thus, the breach of an express warranty that the tower would withstand a 120 mile an hour wind was established by proof that it collapsed under a lesser wind. See S-C Industries v. American Hydroponics, supra, 468 F.2d 852. A precise technical explanation behind the failure is not required. "If misuse or fault on the buyer's part has contributed to or caused non-conformity, that is a matter which seller clearly may raise." Fargo Machine & Tool Company v. Kearney Trecker Corp., 428 F.Supp. 364 (E.D.Mich. 1977). See also Drier v. Perfection, Inc., supra, ___ S.D. ____, 259 N.W.2d 496.

In the instant case, of course, Community went far beyond the above requirements. It was proven that the tower was in excellent condition at the time of collapse. (A. 1377). It was proven that ice and snow, as suggested by Dresser, did not cause the collapse (A. 76, 197-198, 244-245, 266-268, 282-286, 402, 665-670, 792-796). Finally, expert testimony was offered to show that harmonic resonance caused the tower to collapse. Although this expert testimony was offered in

support of another theory of recovery and was unnecessary for the breach of express warranty claim, it is nevertheless consistent with the jury verdict. The jury could have properly concluded that when the winds reached a speed of approximately 80 miles per hour, the dampeners attached to the guy cables at each anchor point were unable to properly suppress the vibration and galloping of the cables. The inevitable result, of course, was the tower collapse. Thus, the design of the tower and its dampeners to withstand a wind velocity of 120 miles per hour was breached.

CONCLUSION

The Trial Court properly held that an unlimited express warranty cannot be negated by a manifestly unreasonable time limitation and that the limited remedies clause failed its essential purpose under the circumstances presented. The jury verdict is supported by substantial evidence.

The Judgment should be affirmed.

Dated January 6, 1978.

Respectfully submitted,

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IN THE

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 77-1150

COMMUNITY TELEVISION SERVICES, INC.,

Plaintiff-Appellee,

vs.

DRESSER INDUSTRIES, INC.,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
DISTRICT OF SOUTH DAKOTA, SOUTHERN DIVISION,
HON. FRED J. NICHOL, JUDGE

APPELLANT'S REPLY BRIEF

COMMUNITY'S MISSTATEMENT OF THE FACTS

Community has perceived the legal ramifications of its contract with Dresser and in an attempt to escape therefrom, it has assumed the guise of a naive consumer, ignorant of the terms of its own agreement.

Community sets the stage for this distorted image by suggesting that it never signed the 1968 agreement.[1]

[1]The suggestion is not only blatantly false, but of no legal import to the case at bar, as established by the very authority on which Community relies. *Earl M. Jorgensen Co.* v. *Mark Construction, Inc.*, — Hawaii —, 540 P.2d 978 (1975). In that case, the court found that the limitation of liability clause printed on the back of the seller's quotation was part of the parties contract, despite the fact that the buyer never signed that form.

Where Community claims the contract should have been signed by the buyer, it says that only the seller's signature appears. Dresser, it insists, "must admit to this unusual and meaningless practice" of having the seller "acknowledge its own terms and conditions". (C.B. p. 12)[2] The implication is insidiously misleading. Community's Secretary, Bentson, signed the 1968 agreement. He signed on the reverse side of page two of the proposal, the page on which the contract was executed, and on the line unmistakably designated for the buyer. (A. 1363) More importantly, he signed directly below the very terms and conditions of which Community now pretends to be ignorant.[3]

Despite this revealing and irrefutable fact, Community insists it was unaware of Item 9, protesting that that clause "was never brought to (its) attention."[4] (C.B. p. 12) But "one who does not choose to read a contract before signing it cannot later relieve itself of its burdens". *Royal Indemnity Co. v. Westinghouse Electric Corp.*, 385 F. Supp. 520, 524 (S.D.N.Y. 1974). Community twice entered into agreements with Dresser containing Item 9 in identical form. If on each of those occasions it signed the contract without, on its own initiative, acquainting itself with that clause, then it has conducted its business with a

[2]References to briefs of the parties shall appear hereafter as "CB" for Community's brief, and "DB" for Dresser's opening brief.

[3]The line on which McKinney's signature appears could only have been intended for the seller, in that it is preceded by the words "WE ARE PLEASED TO SUBMIT THE FOLLOWING QUOTATION". (A-1364, 1365)

[4]Community's contention that McKinney testified to this effect is inaccurate. McKinney testified that the identical terms and conditions were reviewed during the 1966 negotiations (A-994) and that there was no "*further*" discussion on Item 9 in 1968 because they "had already been down that path". (A-999)

reckless abandon that does not deserve the protection of this Court.

ARGUMENT

I.

THE JURY VERDICT CANNOT BE VINDICATED.

In its initial brief Dresser challenged Community to explain the fatal evidentiary defect acknowledged by the trial court when it observed:

> . . . The thing that bothers me—and I guess Mr. Evans addressed it just before lunch—is, where is—I really don't see where there's any testimony on the part of your experts that there was any breach of a warranty as to the 60 pounds per square foot on flat surfaces.

Community not only failed to meet that challenge, but has tacitly conceded that there is no proof that the tower was not designed to "*resist a uniform wind load . . . (of) 60 psf on the flats*"—the only warranty at issue in these proceedings. It is revealing that, while Community states that there is "ample evidence to support the verdict" (C.B. p. 48), it did not make a single record reference in support of that sweeping assertion.

Throughout its brief (C.B. pp. 6, 22, 42, 47) Community refers to "defective tower design" — but the record reveals just the opposite. None of Community's experts testified that the tower design was defective, let alone that such purported defect was the

cause of the collapse.[5] In fact, its two key technical experts were both of the opinion that the tower was designed to meet the 60 psf specification. (A. 446, 447, 727) Further, Dresser's expert made the only technical analysis of the tower and its component parts and, based thereon, unequivocally testified that the tower was constructed and designed to meet the 60 psf specification in all respects. Community made no effort to rebut that testimony and its brief offers nothing to refute the import of that evidence. Accordingly, the fact remains that Community failed to prove that Dresser breached its design warranty and it virtually concedes this to be true.

Community now takes the astounding position that all that is necessary to support the jury's verdict is the fact—which has never been disputed—that the tower collapsed while the wind velocity was less than 120 m.p.h. (C.B. p. 49) Community claims that it was therefore unnecessary to prove the precise reason for the tower's collapse. But this argument is plainly false. There are any number of factors which could have caused the tower to collapse at a wind velocity of less than 120 m.p.h., but which would not involve a breach of the 60 psf wind loading specification warranty. Community admits this critically important fact in its brief when it concedes that if Dresser

[5]Tex Hardy, Community's key expert, strongly indicates that he considered and rejected all potential causes of the tower collapse—even defective design—before concluding that harmonic resonance was the only thing left that might have caused the tower to come down.

Q. You tried to eliminate other causes, and therefore came to the conclusion that since they were eliminated, you had to come up with something else, and this is the something else?

A. Well, I guess that's a negative way to look at it. If you want to look at it from the positive side, *we tried to find a positive cause for it, and when we were unable to find that positive cause, we had to conclude that this (harmonic resonance) was the end result.* (A. 724, emphasis added).

had proved its rime ice theory of causation, it would have "provided a complete defense to the breach of warranty claim." (C.B. 17) And Community's own experts suggested several other possible causes of the tower failure which were completely unrelated to the wind loading specification, including defective or damaged parts, improper dampening and improper tensioning. (A. 741-742) It is therefore clear that the jury's verdict can be sustained *only* if the evidence was sufficient to identify the cause of the tower's failure, and to prove that that cause involved a breach of the 60 psf warranty.

Consistent with its theory that the tower's collapse during a wind of less than 120 m.p.h. is sufficient to prove a breach of warranty, Community abandons the only theory of causation which it attempted to prove at trial—harmonic resonance. Community now claims that the testimony of its four experts on this subject was offered in support of "another theory" of recovery and was "unnecessary" for its express warranty claim and, presumably, unrelated to Dresser's wind loading design specification. (C.B. pp. 49-50) Community is understandably apprehensive about harmonic resonance, because that theory of causation would prove that the tower was *shaken down,* not blown down by the wind—a circumstance totally outside the scope of Dresser's wind loading specification.

In short, Community is in a severe dilemma. Since the record is totally barren of evidence that the tower collapsed because of a design defect, Community must convince this Court that the two requisite elements of a breach of warranty case—proof that the warranty was breached and proof that the breach caused the injury—are established solely by the fact that the tower fell down. When

Community asserts that "*thus, the breach of an express warranty that the tower would withstand a 120 mile an hour wind was established by proof that it collapsed under a lesser wind,*" *(C.B. p. 49)* the spectre of *res ipsa loquitur* cannot be ignored. As previously stated, that doctrine has absolutely no application where, as here, the instrumentality was not solely within the defendant's control. (D.B. p. 45) See, *Prosser on Torts,* 4th Ed., p. 214 and cases cited therein.

The authorities offered by Community in support of its theory are readily distinguishable. In *S-C Industries v. American Hydroponics System, Inc.*, 468 F. 2d 852 (5th Cir. 1972), causation was clearly an element that was proved. As the court noted, the cause of the collapse was "found" to be the result of a defect in the warranted structure. Here, no such "defect" was found and no breach of warranty has been established. Community also mistakenly relies on *McCarthy v. E. J. Korvette,* 28 Md. App. 421, 347 A.2d 253 (1974), a consumer case involving the blow out of a tire which the manufacturer had warranted would not blow out under virtually any circumstances. In addition to the significant contextual differences between *McCarthy* and this case, the warranties involved are irreconcilably distinct. Put simply, the scope of Dresser's 60 psf warranty was not nearly so broad.

Dresser acknowledges that the reversal of a jury verdict generally poses a heavy burden. Here, however, the Appellee, in an effort to vindicate the jury verdict, has:

1. abandoned all its expert testimony dealing with causation;

2. failed to direct this Court to any evidence that Dresser breached its design warranty; and instead,
3. relies solely on a presumption of causation that is not remotely applicable.

We respectfully submit that, under such circumstances, it is no longer a question of burden, but rather a case where the record is so devoid of evidence to support the verdict that it requires reversal.

II.

COMMUNITY'S LEGAL ARGUMENTS THAT THE TERMS OF ITS CONTRACT SHOULD NOT BE ENFORCED ARE UNPERSUASIVE.

Community argues at length that the 60 psf specification constituted an express warranty. We agree. There was never any dispute that the 60 psf specification was explicitly incorporated into the warranty clause (Item 9), and therefore, constituted an express warranty. Community further distorts the legal issues involved in this case by repeatedly suggesting that Dresser attempted to escape its warranty obligations by reliance on paragraph 1 of the Terms and Conditions. That is untrue! Dresser has never relied on that paragraph to disclaim the warranty here at issue. The only real legal issue in this case is and has always been whether Item 9 should be enforced. If it is, Dresser cannot be held liable for the collapse of the Community tower.

A. Contrary to Community's Argument—Item 9 Incorporated The Specification Warranty And Defined The Terms And Conditions Thereof.

Item 9 of the Community-Dresser contract provided that all warranties would extend for six months, but that defects thereunder must be discovered within the same period. Community offers two reasons for ignoring the import of those provisions. First, Community asserts that Item 9 makes reference only to materials and workmanship, does not include technical specifications and "does not make definite reference to the specific design warranty."

Community's position is erroneous. Item 9 clearly refers to and incorporates the specifications contained in the contract:

> Seller warrants, for a period of six months, that products of its own manufacture and any construction performed hereunder by the Seller *shall meet the applicable specifications incorporated in this contract,* and be free from defects in material and workmanship . . . Seller shall, at Seller's sole option, repair, replace, or refund an equitable portion of the purchase price of any product or work which Seller determines to have been defective *or failed to meet applicable specifications.* (A. 1363, emphasis added).

Since the technical specifications and the warranty provisions were not distinct and severable, but were incorporated into Item 9, the six month provisions were unquestionably applicable to the design specification at issue.

In attempting to sever the 60 psf specification from the provisions of Item 9, Community has relied on *S-C Industries v. American Hydroponics System, Inc.*, 468 F. 2d 852 (5th Cir. 1972). That reliance is misplaced. In *S-C Industries* the sales warranty clause was explicitly limited to materials and workmanship and therefore the court held that the warranty limitations did not apply to a design warranty contained in a separate document. The rationale of *S-C Industries* is not applicable to the present case because Item 9 explicitly refers to and incorporates all of the contract's tower specifications.

Second, Community asserts that the six month warranty of future performance is void by virtue of UCC §2-316 (1). That provision does not apply to the warranty of future performance in this case. Section 2-316 (1) focuses only on contract provisions which *"negate or limit"* a warranty, whereas the future performance warranty here involved expanded the warranties otherwise applicable to the tower under the Code. (D.B. p.p. 22-27) Dresser was not required to extend its warranties past the date of delivery. Community's argument that the 60 psf specification, standing by itself, created a warranty of unlimited duration, simply ignores the Code and the authority cited by Dresser. See discussion of *Binkley Co. v. Teledyne Mid-America Corp.*, 333 F. Supp. 1183 (E.D. Mo. 1971) *aff'd.*, 460 F.2d 276 (8th Cir. 1972); *Raymond-Dravo-Langenfelder v. Microdot, Inc.*, 425 F. Supp. 614 (D.C. Del. 1977); *Beckmire v. Ristokrat Clay Products Co.*, 36 Ill. App. 3d 411, 343 N.E. 2d 530 (1976) (D.B. pp. 22-27).

Community attempts to avoid the foregoing cases by asserting that they deal with the application of the statute of limitations. That distinction, however, reveals that Community does not perceive or does not wish to deal with Dresser's argument. Those cases were cited for the proposi-

tion that a technical specification does not create a warranty of future performance unless there is explicit language so providing. Accordingly, Community's assertion that, absent Item 9, the 60 psf specification would have extended beyond delivery is simply wrong. Section 2-316 therefore does not apply.

B. The Defect Discovery Provision Is Valid and Should Be Enforced

Because the six month defect discovery provision would preclude any recovery, Community again relies on §2-316 in an effort to rewrite the contract. Community contends that the defect discovery clause disclaims or contradicts the 60 psf warranty, and is therefore "inoperative". This argument is without merit for the following reasons.

First, §316(1) requires that warranty provisions be "construed wherever reasonable as consistent with each other." Clearly there is no inconsistency in the contract. Read as a whole, the contract provides that the tower will be designed to withstand 60 psf, that the warranty is good for six months after delivery, and that Dresser may be liable for any defect discovered within the six month period. That is perfectly consistent. Moreover, Warranty provisions like Item 9, which incorporate technical specifications but provide a limited defect discovery period, have frequently been upheld by the courts. *American Elec. Power Co., Inc. v. Westinghouse Elec. Corp.*, 418 F. Supp. 435 (S.D.N.Y. 1976); *U.S. Fibres, Inc. v. Proctor Schwartz, Inc.*, 358 F. Supp. 449 (E.D. Mich. 1972), *aff'd*, 509 F.2d 1043 (6th Cir. 1975).

All four of the contracts that were introduced into evidence followed this pattern. These contracts included the

1966 and 1968 Dresser tower agreements, the 1975 RCA/Community antenna contract and the 1975 Community/Kline Iron & Steel Co. replacement tower contract. (A. 1363, Ex. 88, Ex. AV.) Both the RCA and Kline contracts incorporated specifications, but limited all warranties to a period of six months (RCA) or 12 months (Kline) after installation in separate, printed warranty clauses. If Community's position were adopted, this common and necessary business practice would be precluded.

The cases cited by Community applying §316(1) are totally inapplicable. In nearly every instance, the seller made oral or written warranties, but elsewhere disclaimed them by stating that there were "no warranties, express or implied". In such cases, it is indeed true that "The front page giveth but the back page taketh away". It is noteworthy, however, that Community cited not a single case in which a defect discovery clause was held inoperative because it conflicted with an express warranty. The reason is clear: there is no such conflict. The six month defect discovery clause was fully consistent with the 60 psf warranty and §2-316(1) has no application.

Second, Community misconstrues §2-316(1) as requiring express warranties to be of "reasonable" duration. Neither that section nor any other UCC provision, we submit, imposes such a requirement.

Community states that "applying SDCL 57-4-34, the only remaining question is whether or not the limitation was a reasonable one". (C.B. pp. 32-33) Community then goes on to argue that the six month defect discovery period was unreasonably short. But this argument proceeds on an erroneous premise. Section 2-316(1) establishes no standard for reviewing the content of an express warranty.

It provides only a rule of contract construction requiring warranty clauses to be reasonably consistent with each other. If the warranty provisions are reasonably consistent, they are to be enforced according to their terms. Indeed, under the UCC a seller is not required to give express warranties at all.

Although §2-316(1) does not impose a substantive standard for express warranties, a consideration of the Community-Dresser contract and business relationship amply demonstrates that Item 9 was in fact reasonable and necessary. The contract should be enforced according to its terms because this was a commercial sales transaction negotiated between experienced corporate entities of relatively equal bargaining power. (D.B. pp. 28-32)

Community had an able and experienced staff, and was assisted by a fleet of legal and technical advisors. Its constituent companies had purchased tall towers on at least four occasions before Community made its first purchase in 1966. Armed with all this experience and advice, and represented by RCA, an industrial giant, Community negotiated with three tower manufacturers before selecting Dresser for the first tower project. Finally, Community had over one month to review the 1968 contract, which contained terms and conditions of sale identical to those contained in the 1966 contract. (D.B. pp. 6-11)

In light of the foregoing facts, Community's assertion that it was at the "mercy" of Dresser is specious. And the litany of consumer cases which it cites are simply not applicable. See, e.g., *Hauter v. Zogarts*, 120 Cal. Rptr. 681, 534 P.2d 377 (1975). The facts of this case are analogous to those cases cited in Dresser's initial brief, where the courts recognized the importance of the commercial

context and fully enforced the terms of commercial sales agreements. (D.B. pp. 28-30)

In a final effort to avoid the terms of its contract, Community makes repeated references to the "fine print" and "boiler-plate" form of the terms and conditions of sale, in which Item 9 was "buried". (C.B. pp. 7, 11, 22, 27, 30, 36-38, 44) It is Community's position that Item 9 should be negated because it was on a page of the contract which contained "fourteen numbered and itemized terms, the last of which contains ten subparagraphs". (C.B. p. 28) It is inconceivable that the *one page* terms and conditions portion of the contract posed any great burden for Community's staff to read, analyze and comprehend. Indeed, in a case cited by Community dealing with a contract strikingly similar to the one in the case at bar, the court in *Fargo Machine & Tool Co. v. Kearney & Trecker Corp.*, 428 F. Supp. 364 (E.D. Mich. 1977) summarily dismissed the very argument which Community advances:

> (T)his involves no multi-page document with buried provisions. Section 8 is one of only fourteen separate sections on a single page, is the only one dealing with warranty obligations and is bold titled "WARRANTY OF MATERIAL AND WORKMANSHIP."
>
> Under these circumstances, the court finds that such commercial buyers' actual awareness and apparent endorsement of the provision obviates any need for conspicuousness in order to prevent surprise. 428 F. Supp. at 372.

The assertion that Community should be relieved of its contract duties because of the length or print style of the

terms and conditions portion of the contract is in direct contradiction to Judge Nichol's decision that Item 9 comported with the UCC standard for conspicuousness. Judge Nichol held that the language of Item 9 conspicuously disclaimed the implied warranties of merchantability and fitness in accordance with §2-316(2). The import of Judge Nichol's decision is that Community "ought to have noticed" the portion of Item 9 which refers to implied warranties. UCC §1-201(10). The same portion of Item 9 which disclaims implied warranties refers to the limited express warranties. (A-1363)

Dresser has also argued that the six month discovery clause was necessary in view of the anticipated six month tower maintenance schedule. Community's rejoinder simply misses the point of Dresser's argument, which was that it is reasonable to shift the risk of loss to the buyer at the time when the buyer assumes responsibility for maintenance, inspection and repair of the tower. In this case, Community began maintenance six months after the tower's erection. This allocation of risks is particularly appropriate because it is often difficult to determine the cause of a tower's collapse. The record below shows that the tower's price reflected this appropriate allocation of risk. (A. 993, 994, 1021)

The conclusion that the six month discovery period was reasonable is in no way contradicted by *Neville Chem. Co. v. Union Carbide Corp.*, 294 F. Supp. 649 (W.D. Pa. 1968), *aff'd.* in part and vacated in part, 422 F.2d 1205 (3rd Cir.), *cert. denied*, 400 U.S. 826 (1970). In *Neville*, the product was a raw material whose defects were not discoverable until it was processed into a final product soon after purchase. Under these circumstances, the court

considered a 15 day discovery period unreasonable. This holding was based in part on the fact that (1) it was impossible to detect the defect until the raw material was processed, by which time the 15 day period had expired, and (2) it was easy to specify a slightly longer discovery period which would fully protect the buyer by extending past the time when the raw material was processed, without leaving the seller's liabilities open-ended. The court concluded that a warranty which in effect expired before the product could be put into use was illusory. It should also be noted that there were strong elements of fraud in this case. The seller knew about the defect and knew it could not be discovered in 15 days.

None of those factors are present here. First, all of the expert witnesses agreed that it was possible to determine by engineering analysis whether the tower complied with the design specification at the time construction was completed. (A. 447, 448, 727, 1120) Six months was more than ample time to conduct this analysis. Second, the tower was in use as soon as it was erected, so that the warranty extending six months thereafter was not illusory. There was no imminent transformation of the tower, corresponding to the processing of the raw material in *Neville*, which would have revealed any alleged defect. Most importantly, there is no alternative to the six month period agreed upon by the parties, except to prolong the seller's potential liability indefinitely, waiting for a wind of the requisite velocity.[6] Such a result would conflict with the UCC's ex-

[6]The same analysis disposes of *Earl M. Jorgensen Co. v. Mark Construction, Inc.*, 56 Hawaii 466, 540 P.2d 978 (1975) and *Wilson Trading Corp. v. David Ferguson, Ltd.*, 23 N.Y.S.2d 398, 244 N.E.2d 685 (1968).

press authorization of risk allocation between commercial buyers and sellers.

The rationale of the UCC in allowing such allocation of risk is articulated by the court in *Tokio Marine & Fire Ins. Co., Ltd. v. McDonnell Douglas Corp.*, 75 Civ. 5915 (S.D.N.Y. Nov. 3, 1977). In that case a commercial airliner manufactured by McDonnell Douglas Corp. and owned by Japan Airlines Co., Ltd. crashed near Moscow, killing 52 passengers. The insurer of the airplane sued to recover the value of the lost aircraft, alleging that the crash was caused by a defective "spoiler," a component part of the airplane. The warranty provided that McDonnell's liability for allegedly defective component parts was limited to defects discovered within one year after sale of the aircraft. It was undisputed that the alleged spoiler defect was discovered when the airplane crashed three and one-third years after its sale. The court granted McDonnell's summary judgment motion on the basis of its warranty clause. Rejecting Japan Airlines' argument that, because the defect was latent, the one year defect discovery provision was invalid, the court said:

> JAL misconstrues the nature of the warranty. It was not designed to assure that JAL would have a perfect plane after the specified period of time. The warranty provided that any defects which became apparent during the warranty period would be repaired by MDC. Furthermore, while it is true that the spoiler defect was a latent one which would not necessarily be expected to surface within the warranty period, this observation is equally true with respect to any complicated machine which is sold with a limited warranty. The logic of JAL's argument would require that MDC as well as the manufacturers of

> all complicated machinery warrant that all non-obvious defects which eventually surfaced would be repaired anytime during the life of the machine. This is contrary to reason and the language of warranties generally. JAL offers no reasonable time limit for a warranty for a complicated jet aircraft. The court cannot say that the warranty life in the JAL-MDC contract was too short or in any way unreasonable.

See, also, *Iowa Electric Light & Power Co. v. Allis-Chalmers Mfg. Co.*, 360 F. Supp. 25 (S.D. Ia. 1973).

Finally, Community's own conduct after the 1975 tower collapse dramatically contradicts its claim that this tower should have been covered by a warranty of future performance and defect discovery period of at least six years. After the 1975 collapse, Community's replacement tower was built by Kline Iron & Steel Company, who initially submitted a proposal providing a six month defect discovery period. Community objected to this clause, and the parties negotiated a new defect discovery period. (Ex. AV) The discovery period they agreed to, after negotiation, was one year.

Community negotiated a one year provision in its present contract, yet argues here that the six month period was too short because it represents only 1% of the tower's alleged useful life. By the same token, the one year period in the Kline-Community contract is only 2% of the alleged useful life. In view of this *de minimis* distinction, six months cannot be too short as a matter of law.

Judicial reformation of a commercial contract is an extraordinary remedy which should not be engaged in by the Court absent compelling circumstances not remotely present here. In the final analysis, in a commercial trans-

action such as the sale of a television tower, the best guide to what is fair and reasonable is the contract the parties have negotiated and signed.

C. The Substitution of a Defect Discovery Period is an Appropriate Issue for this Court's Review

When the trial court struck Item 9 from the contract it left no defect discovery provision in its place. The result was to make Dresser's liabilities open-ended, contrary to the intent with which the parties contracted. Community seeks to avoid review of this issue by characterizing it as a statute of limitations defense which may not be raised for the first time on appeal. (C.B. pp. 44, 45)

Community's characterization is legally unsound. The underlying principle of the statute of limitations is that a valid cause of action exists, but that suit thereon is barred by virtue of the passage of time. Dresser does not attempt now, nor has it ever attempted, to invoke that principle. The crux of Dresser's argument is that, in order for a valid cause of action to have existed, Community must have discovered a defect within six months of the tower's erection. In short, it is not the time allotted for bringing suit that is in issue, but rather the time allotted for the discovery of defects which would be actionable under the contract at all. This issue was properly raised by Dresser at trial, and the only "new" issue raised on appeal is whether the trial court should have substituted a "reasonable" provision when it struck the six month defect discovery clause from the contract.

Community has supplied this Court with authority setting forth the standards for appellate review of new issues. *Earl M. Jorgensen Co. v. Mark Construction, Inc.*, 56 Hawaii 466, 540 P. 2d 978 (1975):

> In determining whether to exercise discretion to hear new issues, three factors to be taken into account are "whether the consideration of the issue requires additional facts; whether the resolution of the question will affect the integrity of the findings of fact by the trial court; and whether the question is of great public import." 540 P. 2d at 985.

Consideration of those factors in the instant case compels the conclusion that review of this issue is appropriate. Dresser maintains that UCC §2-725(2) reflects the judgment of the drafters that a four year defect discovery period is the maximum which should be implied where the contract is silent. (D.B. pp. 35-36) Consequently, a period of no more than four years should have been substituted by the trial court when it invalidated the contract's defect discovery provision. The consideration of this issue requires no additional facts, nor will its resolution affect the integrity of findings of fact by the trial court. This issue involves only a question of law and, as such, is appropriate for review by this Court. *Foster v. United States,* 329 F. 2d 712 (2d Cir. 1964).

But there are other and even more compelling reasons why this issue should now be reviewed. The question of whether reasonable alternatives should be substituted when contractual defect discovery provisions are invalidated is one of first impression in this jurisdiction. Its resolution will have far-reaching implications in commercial transactions in this and all other states which have adopted the Code. For the import of the District Court's failure to make such a substitution is th[illegible]once a con-

tractual provision is invalidated, the seller's liability will be without limits, regardless of the risks the parties intended to bear. It is an action which flies in the face of the principles and procedures set forth in the Code,[7] and which poses a serious threat to the conduct of future commercial transactions. We urge that this question is of great public import and should be reviewed by this Court on appeal.

D. The Limited Remedy Provision Should Be Enforced.

The parties' contract unambiguously provided that Community's remedies for an actionable breach would be limited to repair, replacement or refund of the purchase price. This limitation of remedies is expressly authorized by §2-719(1). Community asserts that the contract provision is "inoperative," advancing only two arguments for support.

First, Community contends that the tower's total collapse was a "novel circumstance" which was "surely not within the contemplation of the parties." (C.B. pp. 46-47) The contention is incredible. Community purchased its second tower only a month and a half after its first was demolished. Thus, such a circumstance was not only "within the contemplation of the parties," but was the sole reason why the parties contracted and must have been foremost in Community's mind.

[7]It is a fundamental principle of the Code that the intent of the parties is to be given effect. UCC §1-102, Official Comment 2. Where a provision relating to remedies is found invalid, however, the buyer may avail itself of the remedies provided by the Code. UCC §2-719(2). If th defect discovery provision in the instant contract was unenforceable, therefore, the trial court should have turned to the four year period suggested as a maximum by §2-725(2).

Community next argues that a refund of the purchase price would not compensate it for all its damages and, therefore, falls "far below the acceptable minimum" required by §2-719. But to say that the buyer must be compensated for all damages is to say that there may be no limitation of remedies whatsoever. The Code quite clearly provides to the contrary, explicitly authorizing the remedy at issue in this case. UCC §2-719.

The cases cited by Community on p. 47 of its brief are inapposite for the reasons discussed above in connection with *Neville Chemical Company v. Union Carbide Corporation, supra.* In addition, *Earl M. Jorgensen Company v. Mark Construction, Inc.*, 56 Hawaii 466, 540 P. 2d 978 (1975), is distinguishable because in that case the seller refused to fulfill its obligation to repair the defective product. This is a well-recognized reason for holding that a remedy fails of its essential purpose, but it is not relevant to the present case. In cases involving facts analogous to those of this case, limited remedy clauses have uniformly been upheld. See, e.g., *Tokio Marine & Fire Ins. Co., Ltd. v. McDonnell Douglas Corp., supra; Am. Elec. Power Co., Inc. v. Westinghouse Elec. Corp.*, 418 F. Supp. 435 (S.D.N.Y. 1976); and *Royal Indemnity Co. v. Westinghouse Elec. Corp.*, 385 F. Supp. 520 (S.D.N.Y. 1974).

CONCLUSION

We respectfully submit that Dresser has demonstrated that the verdict in this case is unsupported by the evidence, and that Item 9 should be enforced according to its terms. Therefore, we urge that the decision of the district court be reversed and judgment granted to Dresser on appeal.

Respectfully submitted,

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Dresser-Ideco
BROADCAST
ANTENNA TOWERS

TV • AM • FM • MICROWAVE
GUYED • CANDELABRA • SELF-SUPPORTING
(TRADE MARK)

DRESSER IDECO

ANTENNA TOWERS DRESSER IDECO CATALOG T-57

INDEX

	Page
Antenna mounts	10
"Candelabra" towers	8, 9
Dampeners	13
Design	3
Elevators	11
Erection	14
Features	3
Fixed base towers	5
Foundations	10
Galvanized finish	14
Guyed towers	4, 5
Guys	10
How to order	16
Ice loads	15
Inspections	14
Insulators	13
Ladders	13
Lights	12
Loads, wind and ice	15
Maintenance	14
Microwave equipment	13
Modifications	14
Multiple antenna towers	8, 9
Paint	14
Pivoted base towers	5
Platforms	12
Price information	16
Self-supporting towers	6, 7
Soil analysis	10
Specifications	15
Telephone circuits	13
Transmission line supports	10
Wind loads	15

1 505

This is the story of towers

Antenna towers for the broadcasting industry. Towers by Dresser-Ideco, leader in tower design and building since broadcasting's infancy, pioneer in the development of the triangular tower, pacemaker in pushing tower heights way past the 1,000-foot mark, creator of the "Candelabra*" multiple antenna tower.

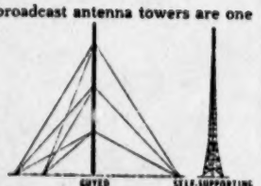
Here in one brochure is the complete broadcast antenna tower story. In words and pictures, factually and informatively, you will find many of the answers you seek as you consider the selection of your antenna tower and its builder.

*Trade Mark

Tower Types

All Dresser-Ideco broadcast antenna towers are one of two basic types:

- Guyed towers
- Self-supporting towers



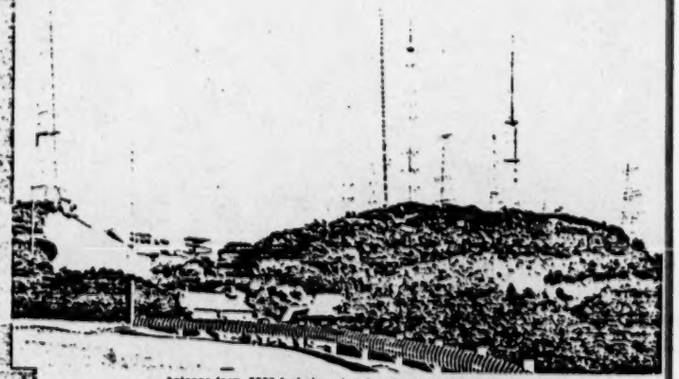
Either type may be used for TV, AM, FM or microwave broadcasting.

Either type may be insulated and either type may carry more than one antenna in stacked, side-mounted or platform arrangements or a combination of these.

Choosing the Right Type

Selection of the right type for your installation depends on the purpose of the tower, the load it will carry, the site available and the height at which the antenna will be carried.

Dresser-Ideco representatives, working from a broad background of experience in handling tower installations of all types and heights, can help you select the type which will do your job best.



Antenna farm, 9900 feet above Los Angeles at Mt. Wilson, California. Some of the Dresser-Ideco towers here have been in service since the very first days of television. In the winter, loaded with ice and hammered repeatedly with gale force winds, these towers absorb some of the roughest punishment that towers take anywhere in the country... yet continue to give dependable, uninterrupted service.

1 5054234

Dresser-Ideco Tower Features

- **Experience**—Dresser-Ideco towers are designed by the world's most experienced tower engineers, men who devote themselves to this one highly specialized phase of structural design, men who have behind them the background of a company with more than 30 years experience in creating towers for the broadcasting industry.
- **One Contract Service**—A complete tower planning, design, fabrication, erection, equipment installation and tower inspection service offered under *one* contract, one responsibility.
- **Standard Towers**—A variety of types and a wide range of heights are available for economy and quick delivery.
- **Custom Designs** to meet special or unusual requirements in height, wind and ice loads, antenna combinations, site availabilities.
- **Antenna Mounts and Transmission Line Supports** custom designed for *your* installation with complete drawings *and parts* supplied as standard.
- **Complete Package of Accessories**—A wide variety of accessory equipment — some essential, some optional — is available from Dresser-Ideco for your tower. Dresser-Ideco can recommend the equipment you need, then plan for it in the design of your tower. Installation of all accessory equipment is a part of Dresser-Ideco's one-contract service.

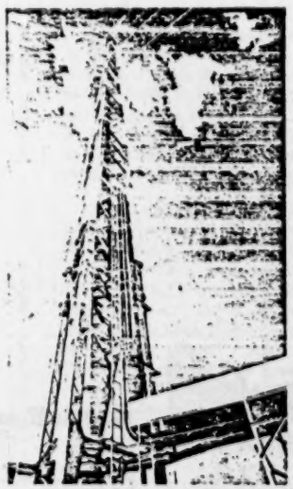
Tower Design

Selection of an experienced tower manufacturer is the single most important decision you will make in planning a new tower installation. Through selecting a properly qualified manufacturer you are assured of a proper and sufficient tower design. And, equally important, you're assured that the tower parts will be fabricated in exact accordance with the designer's specifications.

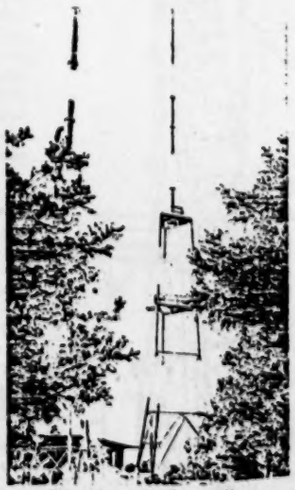
There is no substitute for design and construction experience. And there is no more experienced tower company in the world than Dresser-Ideco.

- Dresser-Ideco has built hundreds of broadcast antenna towers, from many of the country's shortest to a majority of the nation's tallest.
- Dresser-Ideco has consistently been the tower industry's design pacemaker, pioneering triangular tower design, super-tall TV towers, and most recently, "Candelabra" towers for multiple antenna installations.

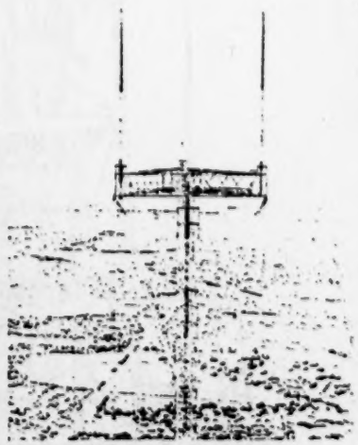
May we suggest that the evidence points to this conclusion: For a standard tower of any height or type or for an unusual structure that requires the development of completely new design concepts and new fabrication and construction techniques, Dresser-Ideco, the world's tower leader, is the logical choice.



A typical Dresser-Ideco super-tall tower is this 1572-foot structure for KWTV at Oklahoma City.



This 99-foot tall self-supporting tower for KHJ-TV located in the mountains above Los Angeles, is typical of hundreds of Dresser-Ideco towers in the lower height ranges.



The first "Candelabra" tower in the world, this 1521-foot tall Dresser-Ideco tower carries antennas for WFAA-TV and KRLD-TV at Dallas, Tex.

A-295

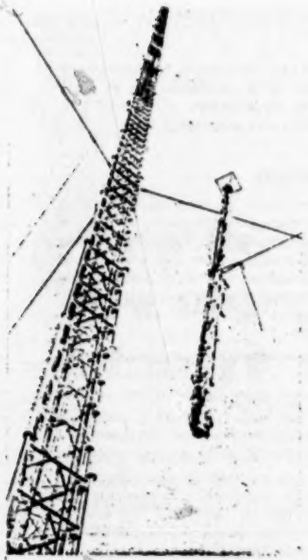
Dresser-Ideco (

Uses — For TV, AM, FM and microwave broadcasting.

Heights — Available in any height.

Antenna Loads — Suitable for any TV, AM or FM broadcast antennas, any microwave broadcast or receiving equipment.

Wind Loads — 20# through 90# wind loads available as standard. Heavier loads available if required.

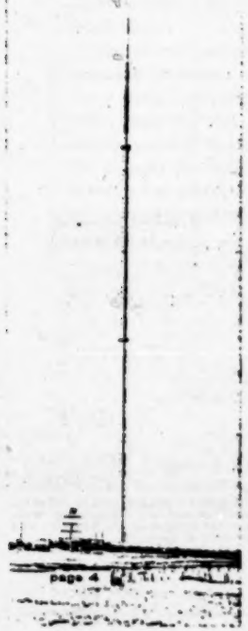


KARK-TV's Channel 4 antenna on the way up. This Little Rock, Arkansas, station's Dresser-Ideco tower is 1175 feet tall.

KCEN-TV's 833' guyed tower at Temple, Texas. Tower carries a 12-bay antenna.

Typical UHF antenna tower. Tower sections are all-welded construction, completely shop-fabricated in 20-foot lengths.

This 550' AM tower for WRFD at Worthington, Ohio, is a typical Dresser-Ideco AM installation. Guys and tower are insulated.



WBEN-TV's 1001' tower at Buffalo, New York. This Dresser-Ideco tower carries a 14 layer supergain antenna.

UYED Towers

A-296

Guyed towers are usually used when a relatively unrestricted land area is available, sufficient to provide room for the guy anchors far out from the tower base.

Since guyed towers are less expensive than self-supporting towers they are normally recommended when the site permits their installation.

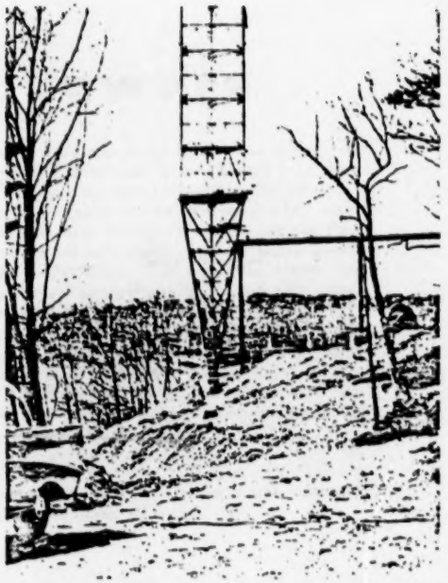
As the photographs on these pages indicate, a guyed tower normally does not taper from base to top, but is the same width along its entire height. Guyed towers are supported by steel guy cables which span out to reinforced concrete anchors buried in the earth at a considerable distance from the tower base.

Normally, guy anchors are located at a distance from the base equal to about ⅔ the height of the tower.

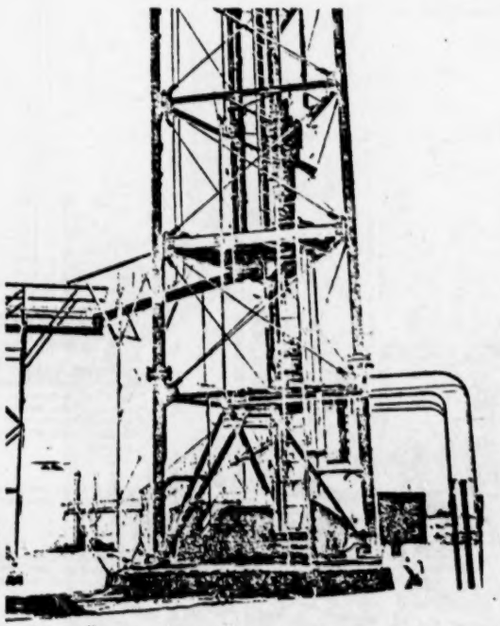
Dresser-Ideco guyed towers are available with either fixed or pivoted base. Each has certain advantages. Dresser-Ideco can recommend the right type for your installation.

Fixed Base Tower—Each leg of a fixed base tower is bolted to the foundation, making a rigid tower to foundation connection. Because they do not taper to a point at the base, fixed base towers permit easy, direct installation of the transmission lines at the ground level. And if a tower elevator is used, its bottom landing can be closer to the ground than is possible with a pivoted base tower. If there is no likelihood of the foundation sinking unevenly, a fixed base tower is usually the best type.

Pivoted Base Tower tapers to a point at the bottom. The tower and the foundation are connected by a swivel pin at this single point. Since the foundation is free to rotate about the pivot point, the tower will remain plumb even if the foundation should sink unevenly. Because of this feature pivoted base towers are usually used when the soil at the site has poor load-bearing qualities.



Pivoted base Dresser-Ideco tower. Note hillside location in fill dirt.



Fixed base Dresser-Ideco tower. Note installation of elevator mechanism on the base, and the simplicity of the transmission line installation.

A-297

Dresser-Ideco S

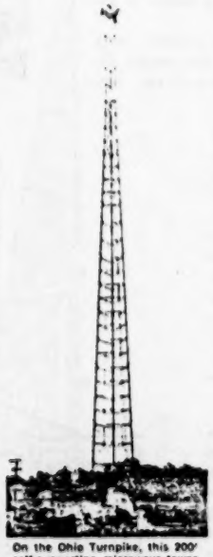
This 200-foot tall Dresser-Ideco tower atop Mt. Wilson, Calif., is designed for a 30-lb. wind load with 2 inches of radial ice.

Uses — For TV, AM, FM and microwave broadcasting.

Heights — Available in any height up through 2000 feet.

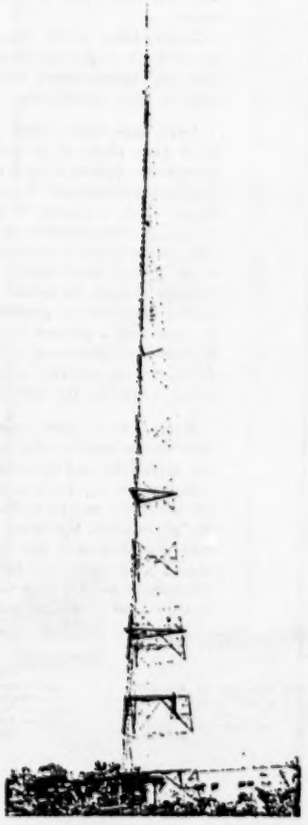
Antenna Loads — Suitable for any TV, AM, FM broadcast antennas or any microwave broadcast or receiving equipment.

Wind Loads — 40# wind load available as standard. Heavier and lighter loads available if required.



On the Ohio Turnpike, this 200' self-supporting microwave tower by Dresser-Ideco helps to link Turnpike police and maintenance stations.

WATE-TV's 649' Dresser-Ideco tower at Knoxville, Tennessee. Tower carries a Channel 6 antenna.



WBNS-TV's 842' self-supporting tower at Columbus, Ohio. This Dresser-Ideco tower is designed for a 40-lb. wind load.

A-298

ELF-SUPPORTING Towers

Here's a building-top TV tower installation by Dresser-Ideco in downtown Philadelphia.

Self-supporting towers are used where space available for the tower base is very limited — on small city lots, building tops, mountain peaks, etc.

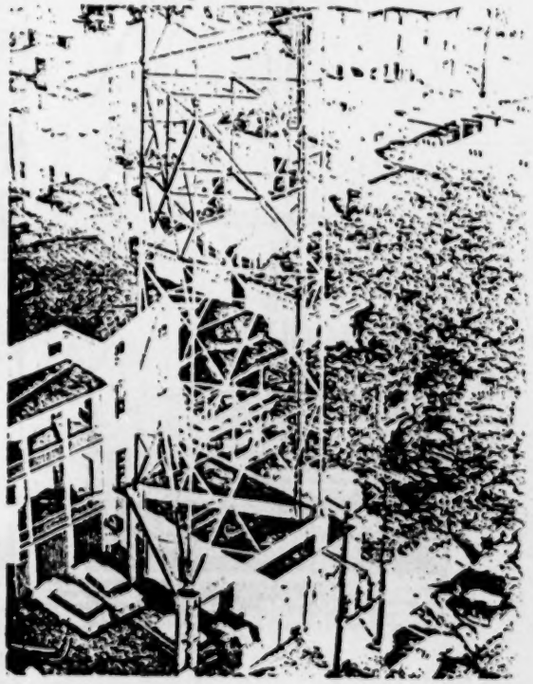
They are usually not recommended when tower height goes over the 900-foot mark, because their cost is considerably higher than for guyed towers in this height range. (Self-supporting towers cost more because they require more steel, take longer to engineer and are more difficult to put up.)

As the photographs on these pages show, a self-supporting tower is wide at its base and tapers gradually to the top. It is not supported by guy cables, but depends on its tapered design for stability.

Normally, the width of the base is equal to about 10% of the tower height.

The Dresser-Ideco self-supporting towers pictured here illustrate a variety of heights and locations, suggesting the situations where a self-supporting tower is the better choice.

Savannah station WTOC's self-supporting tower is squeezed into a small lot. Dresser-Ideco designed a special framework to support the tower over a parking lot and one corner of the transmitter building.



A-299

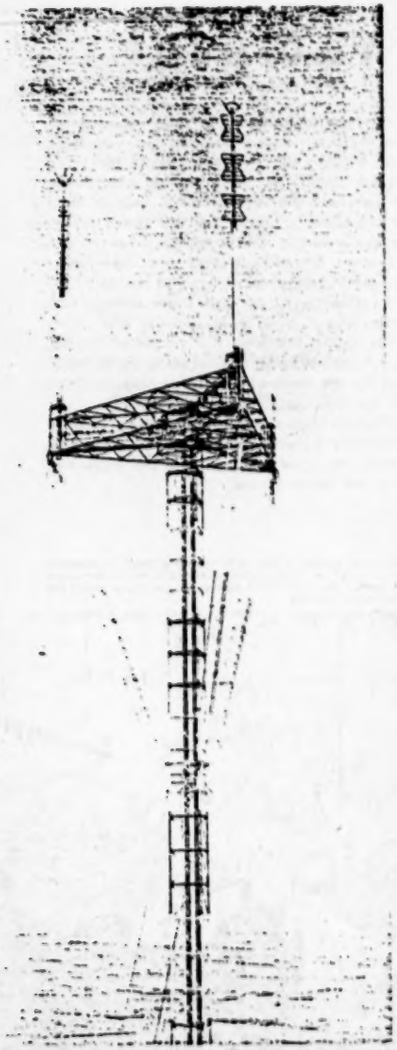
Dresser-Ideco M

Uses — For TV broadcasting or combination TV and radio broadcasting.

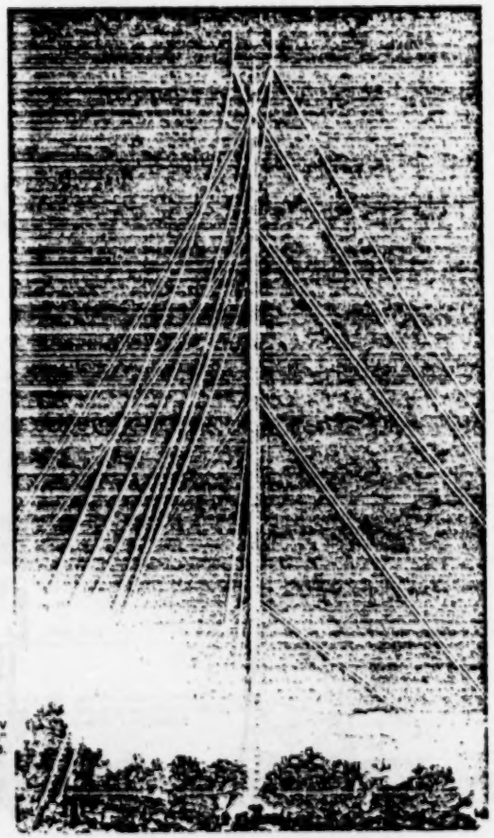
Heights — Guyed multiple antenna towers available in any height. Self-supporting multiple antenna towers available in any height up through 2000 feet.

Antenna Loads — Suitable for any combination of TV, AM and FM antennas.

Wind Loads — Any load or combination of loads required is available.



Close-up photo of the "Candelabra" tower at Dallas, Texas, showing details of the antenna mounts on two corners of the 85-foot-wide top platform. Antennas are 6-bay Channel 4 superturnstile for KRLD-TV and 12-bay Channel 8 superturnstile for WFAA-TV.



Hill Tower at Dallas, Texas, supports the antennas of WFAA-TV and KRLD-TV at a height of 1,521 feet. This first "Candelabra" tower in the nation went into operation in September, 1955.

A-300

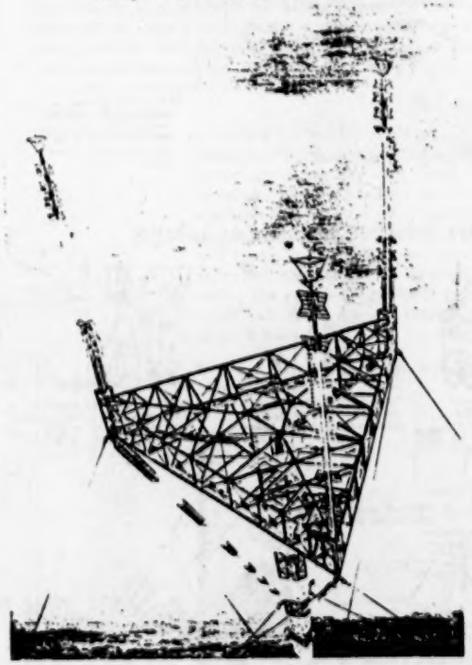
LTIPLE ANTENNA Towers

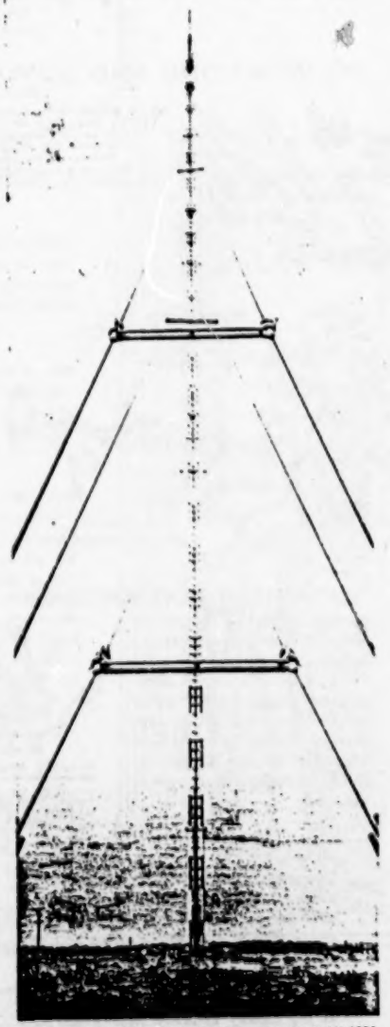
Towers designed to carry more than one antenna can be supplied to provide any one of these antenna arrangements:

1. Antennas stacked one above another (see photo of KWTV tower at right).
2. All antennas at the same height on a top platform, as in the Dresser-Ideco "Candelabra" design pictured at the left and below.
3. A combination of top-platform and side-mounted antennas.

There are several advantages in the use of a multiple antenna tower. Each station saves on the land cost for the tower site. Each station can utilize the area's best tower location. And the problems of air-space clearance are considerably simplified.

Drawing of the Dresser-Ideco 3-antenna "Candelabra" tower for stations WJZ-TV, WBAL-TV and WMAR-TV at Baltimore, Md. The 731' Dresser-Ideco structure is designed for a uniform wind loading of 70 lbs., and top platform is 105' wide on each side.





The World's Tallest Man-Made Structure, when erected in 1954, is this 1572-foot Dresser-Ideco tower for KWTV, Oklahoma City, Okla. Two antennas are stacked on top of this tower — a 14-layer supergain underneath for Channel 13 and a 12-bay superturnstile on top for Channel 9.

A-301

Foundations • Guys • Antenna and Transmission Line Supports

FOUNDATIONS AND GUY ANCHORS

Guy anchors at Hill Tower, Dallas, Texas. Ends of the anchors can be seen protruding from the foundation. Sockets on the ends of the guys are connected to anchors with U bolts.

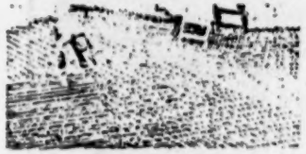
Complete foundation designs and drawings for tower and guy anchors are supplied by Dresser-Ideco, and are based on a laboratory analysis of the load-bearing capacity of the soil, together with a determination of the uplift the foundation and the anchors will be required to withstand.

A steel-reinforced concrete foundation supports and fixes the base of the tower. Anchor bolts for the tower are cast right into this foundation with just the threaded ends protruding. Reinforced concrete guy anchor foundations are buried in the ground with the steel guy anchors cast in them.

It is sometimes necessary to support foundations with piling — for example in swampy land which provides a poor foundation base. Sand, gravel and clay soils are normally satisfactory. Shale and rock are good.

Concrete being poured in the form for a self-supporting tower foundation. Note large concrete pad at the base of the form.

Typical tall tower foundation.



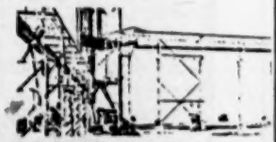
Reinforcing steel being laid in place in excavation for the foundation of a tall Dresser-Ideco guyed tower.

SUPPORTS FOR ANTENNA AND TRANSMISSION LINES

Fittings to properly support the transmission lines, antenna mount and combining networks and hold them in correct alignment are designed and supplied by Dresser-Ideco. Steel supports at 10-foot intervals hold transmission line clamps securely throughout the height of the tower.

Specially designed mount for one antenna on one corner of the top platform on the Hill Tower, Dallas. Ladder goes up to the base of the antenna.

Transmission line and conduit support on typical Dresser-Ideco guyed tower.

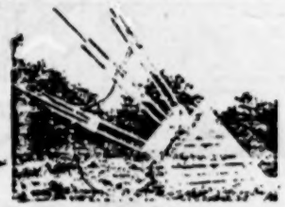


Specially designed supports and ice shield screens for the ground runs of transmission line on a large 2-antenna guyed Dresser-Ideco tower.

GUYS

Tower guys are galvanized bridge strand steel cables or wire rope. Bridge strand guys are cut to length at the factory and the sockets at each end are cast onto the cable with molten zinc. The completed guy assembly is then prestressed (to eliminate stretching later), and is thoroughly tested at the factory to prove its strength and holding power. End connections on wire rope guys are made with wire rope clips.

Sockets which are molded to the bottoms of guys in the factory are slipped over U-bolts which are secured to the guy anchors.



A-302

Tower ELEVATORS

An elevator is practically a "must" on towers 700 feet or more in height, and Dresser-Ideco suggests that, under certain circumstances, an elevator would be a practical investment in a tower of lesser height. Here's why:

An elevator is the best insurance you can buy against long periods of interrupted service. With an elevator, it's possible to get a technician up on the tower fast, even at night or in icy winter weather, to locate and correct trouble.

On-the-job supervision is easy. With an elevator you can inspect work yourself, get a first hand close up view of equipment in safety and comfort.

Routine maintenance is greatly simplified. Light bulb changes, fastener and paint checks, periodic inspections — all take less time, less effort, cost less money. An elevator puts men on the job fresh and ready to work, not tired after a long climb.

ELEVATOR CAR

The Dresser-Ideco elevator car is all-steel construction with an expandable steel door across the front and small plexiglass windows on each side. It's rated for a load of 750 pounds, will comfortably accommodate two people. Larger elevators aren't practical because of the limited space within most towers.

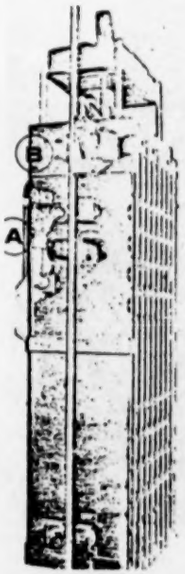
OPERATION

The elevator is easy to operate. A single switch in the car moves the car up or down, stops it at any point on the tower. A radio control system eliminates the need for elevator wiring circuits on the tower, greatly simplifies installation and maintenance. A complete stand-by radio system is available for instant use.

SAFETY FEATURES

The Dresser-Ideco tower elevator is equipped with a number of safety features. The car stops automatically if the door is opened, won't start until it's closed. Over-travel limit switches and spring buffers are located at the top and bottom of elevator travel limits. The car is supported by a double set of cables, either one of which will hold the car and its full load. An automatic safety, which can also be actuated manually from within the car, instantaneously locks the car to the guide rails in the event of cable failure. (See detail photo B below)

Send for the complete bulletin on the Dresser-Ideco tower elevator.



DETAIL A
Spring-loaded rollers on the car engage guide rails on the tower to prevent car sway, insure smooth operation. (Patent pending)

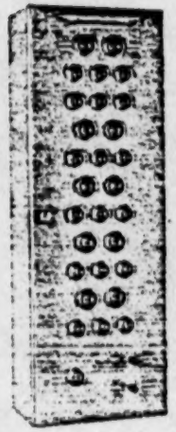
DETAIL B
Cover plate removed to expose the knurled steel roller, which is automatically actuated, locks the car to the guide rails if the cables fail. (Patent pending)

Tower ACCESS

LIGHTS
(Standard equipment)

Complete lighting systems designed in accordance with FCC and Civil Aeronautics Authority requirements are supplied with each tower. The lighting systems contain a series of flashing red beacons and red obstruction lights located at intermediate levels together with the necessary conduit, junction boxes and switches. The number of beacons and lights varies with the tower height.

A photo-electric lighting control which automatically turns the tower lights on at sunset, off at sunrise, is available as optional equipment.



Lamp failure indicator panel installed in the transmitter building at KWTV, Oklahoma City. Lights on the panel correspond to the lights on the tower.

Dresser-Ideco engineer inspects the top beacon on a multiple-antenna tower.

PLATFORMS
(Inside standard, outside optional)

Inside platforms are located at each light level to provide safe rest and work areas and are provided as standard with each tower.

Outside platforms with railings are optional and can be installed at any level.

Top platforms to carry multiple antenna installations are fitted with catwalks, railings and ladders to provide easy access to antennas and transmission lines.

A. Inside platforms at each light level provide easy and safe access for bulb changes and other lighting system service.
B. Each outside platform is surrounded by a railing. Heavy-gauge burred plate floor provides traction and good drainage.
C. Outside platforms completely surround this self-supporting Dresser-Ideco tower at two levels to provide access to microwave equipment.

ORY EQUIPMENT

Lights, ladders, inside platforms at light levels, insulators (when required) and guy dampeners (when required) are furnished as standard accessories with each Dresser-Ideco tower.

Telephone circuits, microwave equipment supports and outside platforms are optional equipment.

Whatever combination of accessories you require is provided for in the design of your tower. Accessory cost and installation is included in Dresser-Ideco's one-contract tower package.

MICROWAVE EQUIPMENT SUPPORTS
(Optional equipment)

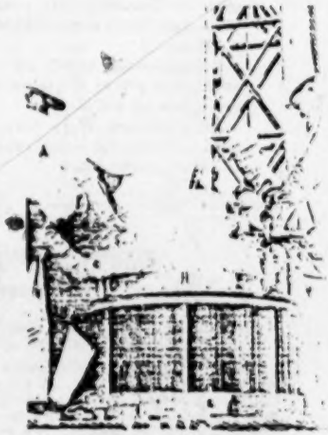
Mounts for microwave dishes and reflectors can be supplied, together with the platforms, catwalks and ladders needed to make the equipment easily accessible for servicing.

NOTE: Since microwave equipment adds to the loading of the tower, it is important that it be planned for in the original tower design. It is always unwise to install microwave equipment on an existing tower without first consulting the tower manufacturer.

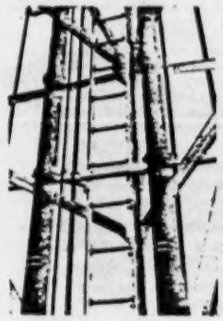
Large microwave screens on the 1,069-foot Dresser-Ideco tower for WSAZ-TV at Charleston, W. Va.

INSULATORS
(Standard equipment if required)

Tower and guy insulators can be furnished in a wide variety of sizes, electrical capacities and types. They range from simple single cone insulators for light towers to complex assemblies like the tube base insulator designed by Dresser-Ideco for KWTV's 1,572-foot tower at Oklahoma City (see photo at right), capable of withstanding a crushing load of over 11 million pounds.



Insulated base, KWTV tower.

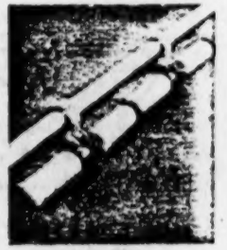


LADDERS
(Standard equipment)

Ladders are installed to the full height of each tower. Installation is made so that one inside corner of the tower acts as a safety cage for the climber. Ladders are supported by angle cross braces at 10-foot intervals. Rungs are spaced for easy climbing or descent.

GUY DAMPENERS
(Standard equipment if required)

Dampener weights are clamped to tower guys (see photo) at uneven intervals, to prevent excessive vibrations in the guys sometimes caused by the wind. When guy dampeners are indicated, the correct types and sizes are supplied and correct locations are indicated on the erection drawings.



TELEPHONE CIRCUITS (Optional)

Telephone lines and jack boxes can be installed on the tower to provide quick, easy communication between workers on the tower and on the ground.

Galvanizing • Painting • Erection • Inspection • Maintenance • Modifications

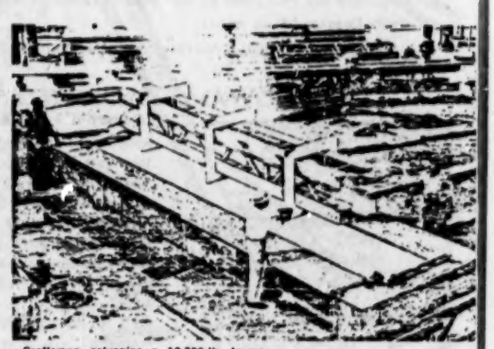
GALVANIZING AND PAINTING

Hot-Dip galvanized towers are recommended by Dresser-Ideco for any installation.

Towers supplied with a galvanized finish have a heavy coating of zinc bonded to the steel. Zinc has a high resistance to corrosion and forms a protective shield around each tower part. At the same time it electro-chemically protects small areas exposed by scratches that might otherwise become starting points for corrosion. Dresser-Ideco galvanizing meets ASTM specifications A-123 and A-153.

Non-galvanized towers are given a shop coat of red oxide paint primer to protect the steel during transportation, storage and erection.

After erection, every tower is painted in alternate bands of white and aviation red, in accordance with FCC and CAA specifications.



Craftsmen galvanize a 12,300-lb. tower section in Dresser-Ideco's huge 35' 10" long kettle.

Over 900 feet up—erection crew swings a tower section into position with a gin pole.

ERECTION

Selection of an erection contractor who has adequate experience and who is properly equipped for your job is of utmost importance. Dresser-Ideco can supply this service as a part of your complete tower contract or will be happy to recommend a competent erector to you.

Dresser-Ideco tower engineer making a final inspection of a new tower.

INSPECTION • MAINTENANCE

Your tower should be inspected at regular intervals. A yearly inspection is the recommended minimum, and in areas where storm seasons have regular cycles it's recommended that regular inspections both precede and follow these seasons. It is also recommended that a special inspection be made following any severe storm. Dresser-Ideco's Field Service Department supplies a tower inspection and maintenance service. The Department is staffed by thoroughly experienced graduate engineers who climb your tower, personally inspect it and give on-the-spot supervision to maintenance work. *Send for your copy of the "Hip-Pocket Tower Check List" containing Dresser-Ideco's suggestions for making a complete tower inspection.*

The "Hip-Pocket Tower Check List," available free from Dresser-Ideco.

MODIFICATIONS

Modifications to your tower or the installation of additional equipment on it should not be made without first consulting the tower designer. Tower loads and safety factors are carefully computed and allowed for in the original design. Any changes or additions can materially affect these factors and potentially endanger the tower. Dresser-Ideco maintains a complete file of drawings on every tower sold and offers a modification or equipment addition consulting service to Dresser-Ideco tower owners at no charge.

Wind and Ice Loads

Wind force creates the most critical loads to which a tower is normally subjected. When ice forms on tower members thereby increasing the surface area resisting the passage of wind, the load is increased.

Properly designed towers will safely withstand the maximum wind velocities and ice loads to which they are likely to be subjected. Dresser-Ideco can make wind and ice load recommendations to you for your area based on U. S. Weather Bureau data.

Tower wind loads are designated in pounds. For example, a 40-lb. tower is designed to safely withstand a horizontal wind pressure of 40 lbs. per sq. ft. on flat surfaces. This is equivalent to an actual wind velocity of 97.5 miles per hour. In figuring surface areas, the tower designer must take into account not only the tower members and antenna, but *all* equipment—transmission lines, platforms, microwave equipment, etc.

TABLE FOR CONVERTING WIND VELOCITY TO WIND PRESSURE

Wind Velocity (in miles /hr.)	Wind Pressure (in lbs/sq. ft. on flat surfaces)	Wind Velocity (in miles /hr.)	Wind Pressure (in lbs/sq. ft. on flat surfaces)	Wind Velocity (in miles /hr.)	Wind Pressure (in lbs/sq. ft. on flat surfaces)
50	10.5	100	42.0	150	94.5
55	12.7	105	46.3	155	100.9
60	15.1	110	50.8	160	107.5
65	17.8	115	55.5	165	114.3
70	20.6	120	60.5	170	121.4
75	23.6	125	65.6	175	128.6
80	26.9	130	70.9	180	136.1
85	30.4	135	76.5	185	143.7
90	34.0	140	82.3	190	151.6
95	37.9	145	88.3	195	159.7
				200	168.0

General Specifications
for Dresser-Ideco Towers

MATERIAL

All structural steel shall conform to American Society for Testing Materials Standard Specifications for Steel for Bridges and Buildings, Serial Designation A7, or better. Where materials of higher quality are used, unit stresses providing the same factor of safety based on the yield point will be used.

LOADING

The wind pressure shall be applied to 1.5 times the normal projected area of all members in one face of the tower plus the projected area of all the transmission lines, conduit and other equipment.

The total load specified above shall be applied to the structure in the directions which will cause the maximum stress in the various members.

The dead weight of the structure and all material attached thereto shall be included.

UNIT STRESSES

All parts of the structure shall be designed so that the unit stresses resulting from the specified loads shall not exceed those allowed by the Radio-Electronics-Television Manufacturers Association (RETMA) specification TR-116, latest revision.

Minimum material thickness shall be 3/16" except on platform floors where 10 gauge burred plate shall be used.

GUYS fitted with end sockets

Guys shall be galvanized bridge strand conforming to Bethlehem Steel Co., American Steel and Wire Co. or John A. Roebling's Sons Corp. specifications. Fittings shall be attached with molten zinc by the cable manufacturer and the assembly shall be pre-stressed and proof loaded to 50% of the rated breaking strength of the strand.

The factor of safety for guys shall not be less than 2.5 under design loading conditions. An initial tension equal to ⅛ of the breaking strength shall be placed in the guys after erection. Instructions for accurately measuring this initial tension are to be furnished with each tower. Bridge sockets at the lower end of each guy are to provide for 48" of adjustment.

GUYS fitted with wire rope clips

Guys shall be galvanized wire rope conforming to Bethlehem Steel Co., American Steel and Wire Co. or John A. Roebling's Sons Corp. specifications. End connections shall be made using galvanized drop-forged wire rope clips, conforming in number to the wire rope manufacturer's specifications.

The factor of safety for guys shall be not less than 2.5 under design loading conditions. An initial tension equal to ⅛ of the breaking strength shall be placed in the guys after erection. Instructions for accurately measuring initial tension are to be furnished with each tower.

MANUFACTURE and WORKMANSHIP

All manufacturing and workmanship shall be equal to best practice in modern manufacture of similar materials. All welding shall be done in accordance with the requirements of the American Welding Society specifications, latest revision.

FINISH

Galvanized towers shall be hot dipped in accordance with ASTM designation A-123 for structural steel and A-153 for hardware. All galvanized parts shall be shop treated to provide a suitable surface for field paint.

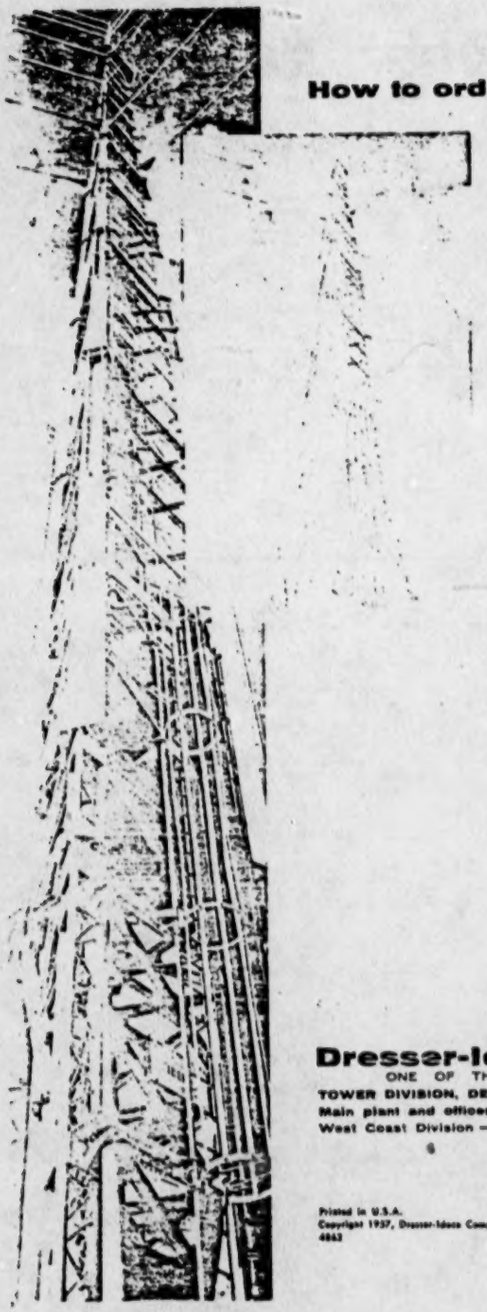
Non-galvanized towers shall have one shop coat of red oxide primer. Bolts and hardware for all towers shall be galvanized.

PLANS and MARKING

Complete erection drawings and detailed foundation drawings shall be furnished. All steel except hardware shall have piece marks stamped into the steel, figures to be ½" high. Corresponding marks shall be shown on the erection drawings.

FOUNDATIONS

Foundations shall be designed for soil conditions existing at the site.



A-307

How to order your Dresser-Ideco tower

Here is the basic information needed in order for Dresser-Ideco to recommend the proper tower for your requirements and submit a price quotation to you.

1. Over-all height of tower plus antenna, from ground to tip of top beacon.
2. Type of antenna or antennas to be supported.
3. Number and size of transmission lines.
4. Design loading required (in terms of wind pressure).
5. Accessory equipment required—elevator, outside platforms, telephone system, microwave equipment, etc.
6. Dimension of area available for the tower installation.
7. Report on survey of tower site showing relative elevations of foundation and guy anchor locations.
8. Report on laboratory analysis of soil at the site.

Before all this information is in hand though, we'll be happy to help you develop preliminary tower plans and cost estimates. This is a service we're glad to render, at no cost or obligation to you.

When you think tower, think of Dresser-Ideco... the world's leading tower designers and builders. A letter or phone call will bring prompt service.

Dresser-Ideco Company
ONE OF THE DRESSER INDUSTRIES
TOWER DIVISION, DEPT. T
Main plant and offices – 875 MICHIGAN AVE., COLUMBUS 8, OHIO
West Coast Division – 8909 S. Vermont Ave., Los Angeles 44, California

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DRESSER

CRANE, HOIST & TOWER DIVISION

ONE OF THE DRESSER INDUSTRIES

875 MICHIGAN AVENUE • COLUMBUS, OHIO 43215

Community Television Services, Inc.
c/o KELO - 1021 LaSalle Avenue
Minneapolis, Minnesota

PROPOSAL NUMBER 32670

DATE July 2, 1968

Attention Mr. L. Bentson, Secretary

REFERENCE: Tower at Sioux Falls, South Dakota

ARE PLEASED TO SUBMIT THE FOLLOWING QUOTATION:

PAGE 1 OF — PAGE(S)

QUANTITY	DESCRIPTION	WEIGHT	PRICE
one	Dresser guyed tower, 1934 feet in height from ground to top of lightning rod, in accordance with Specification 32670, paras. 1 through 9. Material furnished includes tower plus items listed in paragraph 3B of the specifications.		
	All labor necessary to do the work as outlined in para. 7, section 7.1 through 7.7.		
	All engineering, labor, and materials necessary to do the work as outlined in para. 8.		
	PRICE, Items 1, 2, & 3:		$38 ,000.

NOTES

1. This proposal is for a new tower that is an exact replacement of the tower as previously furnished per our Proposal T-5172-2, Rev. A-B, dated July 22, 1966, with the minor exception that the 3 1/8" transmission line to KELO's FM antenna will be rigid instead of flexible line.

2. The above price quoted is based upon Dresser utilizing as much of the existing materials on site as possible.

3. Prices include all material delivered to the tower site.

4. An approximate delivery schedule is shown below:

   Tower shipment 8 to 10 wks. from date of order
   Construction complete 15 to 17 wks. from date of order

O. B.

IPMENT

RMS

AGREEMENTS ARE SUBJECT TO THE TERMS AND CONDITIONS OF SALE PRINTED ON THE BACK OF THIS SHEET

DRESSER

CRANE, HOIST & TOWER DIVISION

ONE OF THE DRESSER INDUSTRIES

875 MICHIGAN AVENUE • COLUMBUS, OHIO 43215

Community Television Services, Inc.

PROPOSAL NUMBER 3267(

DATE

REFERENCE

ARE PLEASED TO SUBMIT THE FOLLOWING QUOTATION: PAGE 2 OF ____ PAGE (S

QUANTITY	DESCRIPTION	WEIGHT	PRICE
	NOTES (cont'd.)		
	5. Insurance: See Attachment #1 for insurance coverage.		
	6. Permits, licenses, etc.: The acquisition of all permits, licenses, etc., as required to be obtained to accomplish this construction project to be the responsibility of the customer.		
	7. Payment Terms:		
	-% of total contract price due with order 5%		
	-% of total contract price due with fabrication start 15%		
	-% of total contract price due on ready-to-ship basis and/or complete shipment of material 55%		
	-% of total contract price due in monthly progress payments during erection 25%		

F.O.B.

SHIPMENT

TERMS

AGREEMENTS ARE SUBJECT TO THE TERMS AND CONDITIONS OF SALE PRINTED ON THE [illegible]

INSURANCE

Certificates in evidence of the following insurance coverage, valid for this job, shall be furnished by Dresser prior to start of construction at the site:

a) Workmen's Compensation and Employer's Liability—statutory

b) Bodily injury liability—except automobile*

c) Property damage liability—except automobile*

d) Bodily damage liability—automobile*

e) Property damage liability—automobile*

DRESSER SPECIFICATION #32670 for Community Television Services, Inc.

July 3, 1968

1. *General Requirements*

Overall height above ground:	1984 feet
Length of antenna:	75.9 feet
Height of tower above ground:	1908.1 feet
Style of tower:	Guyed
Guy radius:	1450 feet

2. *Design Wind Load*
The tower shall be designed to resist a uniform wind load per drawing T-5172, sheet S-1, 60 psf on flats.

3. *Equipment on Tower*
The tower shall be designed to support the following equipment while sustaining wind pressures as specified in para. 2.

*Items b) through e) have limits of $500,000 for each person or each accident.

A. The material supplied by other than Dresser:

1) Top antenna—RCA TF12AH

2) Two top antenna transmission lines, rigid 6 1/8″ dia.

3) Top antenna deicer circuit.

4) One side-mounted FM antenna—Collins 37M14 at 17 feet below the top of the tower with deicer, for KELO.

5) One side-mounted FM antenna transmission line—3 1/8″ rigid, for KELO.

6) One side-mounted FM antenna—RCA BFC—16 with radome at 17 feet below top of tower (future) for KSOO.

7) One side-mounted FM antenna transmission line—3 1/8″ rigid (future) for KSOO.

8) Four passive reflectors, 8′ x 12′, at elevation 360 feet.

B. The material supplied by Dresser:

1) One deicer circuit, for top TV antenna.

2) One deicer circuit for KELO FM antenna.

3) Elevator (see Elevator Specifications) with voice communications.

4) Lighting system (see para. 4).

5) Electrical circuit (see para. 5).

6) Inside platforms at all light levels and at all microwave equipment levels. One outside

platform on one face of tower located near tower top.

7) Tower complete.

4. *Lighting System*

4.1 A complete lighting system shall be furnished with all wiring enclosed in conduit for the full height of the tower. The following material shall be included:

a) Top and intermediate 300 mm beacons, complete with operating and spare 620-watt, 3000-hour lamps.

b) Intermediate obstruction lights, complete with operating and spare 107-watt, 3000-hour lamps.

c) Junction boxes, watertight, with cable supports.

d) Conduit, with conduit breathers and fittings such as condulets, unions, locknuts, pipe plugs, and U-bolts.

e) All necessary wire.

f) Lighting control unit—indoor housing, photo-electric control, auto-transformer, and line contactor.

g) Power source of 120/208-volt, 3-phase, 4-wire, 60 cycle, to be supplied by the customer at base of tower.

4.2 All material shall terminate at the base of the tower.

5. *Electrical Circuits*

5.1 Two deicers. Complete deicer power and control circuits, wire, junction boxes, wire supports, conduit breathers, and fittings.

5.2 All materials shall terminate at the base of the tower.

5.3 Power source of 460 volts, 3-phase, 3-wire, 60-cycle to be supplied by the customer at the base of the tower.

6. *Tower Construction*

6.1 Material:

Structural steel

Steel shall be of an acceptable structural quality, certified by mill test report, with the choice of steel grade ranging from ASTM A-36, as a minimum, to high-strength alloy steels as required by design loading and choice of same to be at the option of the designer.

Bolts

All bolts shall be fitted with self-locking nuts to avoid loosening from vibration.

6.2 Finish of material:

All steel shall be hot-dip galvanized in Dresser's plant and treated for paint with a copper sulphate solution after galvanizing. All welds shall be cleaned prior to galvanizing by wire brush or by shot blasting. Bolts shall be galvanized.

Tower shall be painted in field with one coat of color paint in stripes as specified by the Federal Aeronautics Administration. Ladders, platform flooring, elevator rails, conduit, transmission lines, guy cables, anchor steel, and microwave equipment shall not receive a field coat of paint.

6.3 Guy cables:

Guy cables shall be galvanized strand or rope and shall be prestressed and proof-loaded prior to shipment. Sockets shall be tested to loads of 50% of the ultimate breaking strength. The maximum load under a full wind shall give a safety factor of 2.5 over the ultimate breaking strength of the cables. Each guy cable shall be shipped in one piece and carefully handled on reels to retain prestressing value.

6.4 Control of oscillation:

Guys shall have an inertia style dampener attached near guy anchor points on each guy to dampen any high frequency vibration in the guys.

7. *Construction Work*

The following work shall be included:

7.1 Unload material furnished by Dresser and haul to site.

7.2 Construct tower with all equipment furnished by Dresser, as indicated in para. 3, section B.

7.3 Install all equipment as indicated in para. 3, section A. TV and/or FM antennas to be as-

sembled under the direction of the antenna manufacturer. Wooden trestles to be supplied by others. Install reflectors as indicated. Alignment of equipment is to be done by others. All items indicated as "future" are not included in this work.

7.4 Install transmission lines and power lines, indicated in para. 3, section A. Installation to terminate at base of tower.

7.5 Install elevator complete and test run to ensure satisfactory installation.

7.6 Apply one field coat of paint, striped as required, to tower and top antenna. Ladder, walkways, elevator rails, conduit, transmission line, guy cables, guy anchor steel, and microwave equipment shall not receive a field coat of paint.

7.7 Inspect all work after completion and submit final report to customer.

8. *Foundations*

Dresser will furnish all engineering, labor, and materials necessary to assure that the existing tower foundations will be in accordance with their original specifications.

ELEVATOR SPECIFICATIONS

9. *Elevator Details*

The elevator will be a Dresser, 750-pound capacity, elevator with an approximate speed of 100 feet per minute.

Safety considerations: When the power is off, a spring-loaded brake consisting of two shoes with brake linings operates against the motor coupling locking the entire system.

The cab is suspended by dual cables with each cable being heavy enough to carry the design load.

Each cable is kept in tension by individual counterweights. If tension is lost in either or both cables and either of the counterweights drops, a switch cuts off the power. If, for any reason, either of the counterweights rises, a switch cuts off the power.

If both cables are broken a "broken-rope," spring-loaded safety is driven against the rails and wedged tightly into place stopping the car instantaneously with no impact.

The "broken-rope" safety may also be operated by pulling a handle within the car. All moving parts are made of stainless steel.

Limit switches cut off the power when the cab reaches the upper and lower limits of its travel.

Overtravel limit switches provide an additional safeguard if the normal limit switches fail to operate.

Spring buffers will stop the car at the top and bottom of its travel if the limit switches fail to operate.

The car gate has an interlock cutting off the elevator control when the gate is open.

The elevator rails are round with connections designed to resist impact of a drop test forcing the broken rope safety to operate.

The elevator rails are galvanized to prevent unseen rust which might cause an accident.

The hoist cables are attached to the top of the cab by sockets which are factory-attached and tested. The bottom attachment is made by a special wedge type fitting which permits adjustment but also permits easy visual inspection of the connection.

The hoist cables are galvanized to prevent destructive or hidden rust.

Elevator construction: The elevator driving machine is a self-contained unit consisting of the gear housing, brake, motor, and outboard shaft bearing mounted on a machined bed-plate. The gear housing is completely enclosed, has an oil reservoir, and operates in oil.

The driving motor has a high starting torque with a low running current. Standard power requirements are a 120/208-volt, 3-phase, 4-wire, 60-cycle, power supply.

The hoisting drum revolves in long babbitted bearings and has spring grease cups for lubrication.

All sheaves have graphite impregnated bearings and have alemite fittings for easy external lubrication.

The elevator cab is 22″ x 30″ in plan with steel sides and heavy beams, top and bottom, acting as a single one-piece frame. The gate opening is 2′ 0″ x 7′ 0″ with a galvanized steel expandable gate.

Guide rollers have sealed self-lubricating bearings and are quiet in operation.

DRESSER CRANE, HOIST & TOWER DIVISION
(Columbus, Ohio)
TERMS AND CONDITIONS OF SALE

1. **GENERAL:** All sales by DRESSER CRANE, HOIST & TOWER DIVISION (Columbus, Ohio) (hereinafter called Seller) are made subject only to these terms and conditions and no others unless expressly provided in writing and signed by an authorized representative of the Seller at its home office. Verbal arrangements and the terms and conditions of any purchase orders submitted by the Buyer shall be of no force and effect. Furthermore, acceptance by Seller of Buyer's or other's specifications are understood to be only for the technical content thereof and any warranties or other terms and conditions thereon shall be of no force and effect. Seller's quotations and proposals are solicitations for offers, and are not offers to sell. Contracts of sale shall become final only upon acceptance by an authorized representative of Seller at its home office. All the information in this quotation is confidential and has been prepared for Buyer's use solely in considering the purchase of the material and services herein described. Transmission of all or any part of this information to others or use by Buyer for other purposes is unauthorized without Seller's written consent.

2. **DELIVERY:** Seller shall not be responsible for non-delivery or delays in delivery occasioned by force majeure or any other causes beyond Seller's reasonable control including, but not limited to, labor difficulties, delays of vendors or carriers, fires, governmental actions, including priorities, regulations and licensing and material shortages. Any delays so occasioned shall effect a corresponding extension of delivery dates which are, in any event, understood to be approximate. Buyer's sole remedy for Seller's failure to deliver within a reasonable time after specified delivery dates (extended as above, if applicable) shall be to terminate the contract of sale and reimburse Seller pursuant to Clause 9 entitled "Cancellation".

3. **CHANGES OR MODIFICATION:** Changes or modification to this order can be made only with the written agreement by both parties to the change, with the agreement including price and delivery schedule modifications.

4. **TITLE AND RISK OF LOSS:** Full risk of loss (including transportation delays and losses) shall pass to the Buyer at the point of shipment unless expressly stipulated. However, Seller retains title, for security purposes only, to all products until cash payment is made and Seller may, at its option, repossess the same, upon Buyer's default in payment hereunder, and charge Buyer with any deficiency.

5. **FREIGHT AND TARIFFS:** All quotations and sales are f. o. b. point of shipment unless otherwise expressly stipulated. Any changes which may occur between date of quotation and date of shipment in transportation charges applicable to delivered prices will be for the account of the Buyer and the price adjusted accordingly.

6. **INSPECTION AND ACCEPTANCE:** If construction is not performed by Seller, products sold hereunder shall be finally inspected and accepted at manufacturer's plant prior to shipment (regardless of whether further installation, inspection, or tests are to be performed at Buyer's site or elsewhere by the Seller). However if Seller is performing construction services, final inspection and acceptance shall be executed within ten (10) days of Seller's notification to Buyer that construction has been completed, and all claims whatsoever by Buyer excepting only those provided for under the Warranty and Limitation of Liability and Patents Clauses hereof and claims for shortages must be asserted in writing by Buyer prior to final acceptance or they are waived. If this contract involves partial deliveries or the construction of more than one unit, all such claims must be asserted prior to final acceptance for each partial delivery or period of completion. Claims for shortages must be asserted in writing within ten (10) days of receipt of shipment.

7. **TAXES.** The amount of any sales, use or other taxes applied directly to this sale or the products sold hereunder is not included in the price and shall be paid by Buyer. If a demand is made on Seller for such taxes and Buyer cannot promptly dissuade the Governmental entity involved, Seller may pay the same and Buyer agrees to promptly reimburse Seller therefor.

8. **CANCELLATION:** Except as provided herein or by law, the contract may not be cancelled. If Buyer cancels this contract Buyer shall pay Seller the sum of one hundred dollars ($100.00) for handling plus all costs and lost profits Seller is entitled to by law and Seller may dispose of materials and products previously allocated to this contract in its sole discretion or may transfer the same to Buyer, whereupon Buyer shall be obligated to immediately take the same.
If at any time prior to delivery of material or construction completion Seller, in its sole discretion, questions Buyer's ability to meet payment terms of the contract, Seller may demand immediate payment in full or satisfactory security and upon Buyer's failure to comply, Seller may cancel the contract immediately without further obligation to Buyer, or at Seller's option suspend performance until Buyer complies with such demand.

9. **WARRANTY AND LIMITATION OF LIABILITY:** Seller warrants, for a period of six months, that products of its own manufacture and any construction performed hereunder by the Seller shall meet the applicable specifications incorporated in the contract, and be free from defects in material and workmanship. Provided Buyer submits a claim in writing to Seller immediately upon its discovery and in any event within six (6) months after shipment of the construction is performed hereunder or within six (6) months after final acceptance by Buyer if construction work is performed, for within six months from notification of completion by Seller of Buyer unjustifiably refuses or delays final acceptance), Seller shall, at Seller's sole option, repair or replace or refund on equitable portion of the purchase price of any product or both with Seller determines to have been defective or failed to meet applicable specifications. If construction work is performed by Seller, then: (i) Buyer acknowledges that defects arising from improper or inadequate construction are not covered by the warranty, and (ii) Buyer's exclusive remedy, upon which any claim is based, f. o. b. Seller's factory for Seller's inspection and/or repair, and (iii) all repairs or replacement by Seller shall be f. o. b. Seller's factory. Items not manufactured by the Seller are warranted and guaranteed only to the extent and in the manner warranted and guaranteed to the Seller by the manufacturer of such items and then only to the extent the Seller is able to enforce such warranty or guaranty.
Except for obligations expressly and specifically assumed under the other clauses of these Sales Terms, the foregoing is Seller's only warranty, obligation, and liability, under law (including alleged negligence) contract or otherwise for or in connection with its products, work and services or use thereof. THE FOREGOING IS EXPRESSLY IN LIEU OF ALL OTHER WARRANTIES WHATSOEVER EXPRESS, IMPLIED AND STATUTORY, INCLUDING, WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS. IT IS SPECIFICALLY UNDERSTOOD SELLER'S PRICE IS BASED UPON THE FOREGOING LIMITATION OF LIABILITY AND BUYER'S WAIVER OF ANY AND ALL CLAIMS FOR DAMAGES.

10. **PATENTS:** Seller agrees to assume the defense of any suit for infringement of any United States Patents brought against Buyer to the extent such suit charges infringement of an apparatus claim by Seller's product in and of itself, provided (i) said product is built entirely to Seller's design, (ii) Buyer notifies Seller in writing of the filing of such suit within ten (10) days after the service of process thereof, and (iii) Seller is given complete control of the defense of such suit, including the right to defend, settle and make changes in the product for the purpose of avoiding infringement. Seller assumes no responsibility for charges of infringement of any process or methods claims.

11. **SPECIAL TOOLING:** Notwithstanding any tool, die or pattern charges or amortization in connection herewith, all special tooling and related items shall be and remain the property of Seller unless expressly agreed to the contrary in writing.

12. **SELLER'S REMEDIES:** All rights and remedies provided for Seller hereunder are cumulative and shall be in addition to all other rights and remedies provided hereunder and under law. Seller's failure in one or more instances to exercise such right and remedies shall not constitute a waiver thereof.
It is understood time is of the essence in Seller's receipt of any material, data, samples, approvals and other items to be furnished by Buyer and Buyer shall be responsible for any added expense caused Seller by delays in furnishing the same with significant delays constituting a breach of this contract.

13. **PERMITS, FEES, LICENSES.** The procurement of all required permits and licenses is the responsibility of the Buyer. At the written request of the Buyer, Seller will obtain same in behalf of the Buyer but any and all fees, service charges and cost incurred in so doing shall be on the Buyer's account and added to the contract price.

14. **CONSTRUCTION CONTRACT:** If this contract includes construction, the following shall apply:

14.1 Price includes on grading of all material supplied by Seller (with the exception of the anchor material) from carrier and hauling (not to exceed 10 miles) to site. The cost of any additional hauling shall be for Buyer's account and added to the price.

14.2 (a) A clear and unobstructed area at least 200 feet by 200 feet must be provided at the construction site permitting unloading, sorting, assembling, and working space for the construction. If guyed, the area between tower and guy anchor foundations also must be clear and unobstructed.
(b) The area immediately surrounding the site must be graded so as to permit the moving of trucks, cranes and/or other equipment required to handle and construct.
(c) Buyer is responsible for obtaining at Buyer's expense, all required permits, zoning approvals, and authorizations of any type or kind for construction covered by this contract.
(d) Buyer shall indemnify and hold harmless Seller and its subcontractors from all claims, actions and demands which may result from their use of the above referenced areas in construction work hereunder and shall reimburse them for all expenses incurred in investigating, handling and defending against the same and shall pay all judgments, awards or settlements resulting therefrom.

14.3 Foundations installed by Buyer must be completed in accordance with the specifications in time to permit continuous work when Seller's crew reports to the construction site.

14.4 All material including but not limited to antenna, transmission lines and tiedown wire. Line clamps, supplied by the Buyer must be available during construction as scheduled by Seller. Drawings showing complete installation details of Buyer furnished materials are to be furnished by Buyer and must be available prior to construction.
Unless otherwise specified herein, the Buyer shall furnish all data, including but not limited to site survey, soil tests, roads and power lines information, required for construction which shall be furnished as per not to delay Seller's work.

14.5 The price is based on using union free workers for the construction work. If local union conditions require the use of any other crew or craft, the difference in cost will be for Buyer's account and the contract price adjusted accordingly. The contract price is also based on weather suitable for outdoor construction. No construction will be performed under the handicap of rain, snow, ice or severe cold unless Buyer agrees to assume the additional costs incurred because of such adverse weather conditions.

14.6 The price and time required for delivery and construction are based upon Buyer's furnishing Seller the exact size and type material specified in the contract and at the location and period. Modifications of these data's must be agreed to by both parties in writing, and it is understood that any such modifications will require a revision of both price and delivery.

14.7 Buyer shall provide on site temporary power service for the operation of tower lighting and small tools during the entire construction period. Cost of providing electrical source connection of tower site and power shall be for the Buyer's account.

14.8 Adequate ingress and egress and the proper maintenance of same access roads on site shall be the responsibility of the Buyer.

14.9 Seller shall carry the risk of loss until Buyer's final acceptance, provided however, that risk of loss shall pass to Buyer in any event, at the following time: (i) ten days after Seller's notification of completion unless Buyer properly objects thereto in writing within said ten days and (ii) if Buyer raises a proper objection during said ten days, then ten days after Seller's notification that said objection has been corrected.

14.10 Unless otherwise specifically agreed in writing or unless such failure is due to Seller's gross negligence or bad faith, Seller shall not be liable for any damages of any kind or nature for any failure to complete construction of the tower by the scheduled date.

BUYER'S ACCEPTANCE: To accept this proposal, please sign and return two copies to DRESSER CRANE, HOIST & TOWER DIVISION (Columbus, Ohio) for final acceptance. This proposal shall become a contract only when, and if, approved and signed at the home office of the DRESSER CRANE, HOIST & TOWER DIVISION (Columbus, Ohio). Upon such signing, one copy of the contract will be returned to you.

Respectfully submitted,

By: R. L. Slad

DRESSER CRANE, HOIST & TOWER DIVISION
(Columbus, Ohio)

By: R. L. Slad

Title: Mgr. Mktg.

ACCEPTED

Buyer: Kaczmarek Television

By: [illegible]

Title: [illegible]

move to Cond 2

Supreme Court, U. S.
FILED
APR 6 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1978

No. 78-1376

DRESSER INDUSTRIES, INC.,
Petitioner,

v.

COMMUNITY TELEVISION SERVICES, INC.,
Respondent.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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April 6, 1979

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INDEX

	Page
RESPONDENT'S BRIEF IN OPPOSITION	1
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions, Statutes and Regulations Involved	2
Statement of the Case	2
Reasons Why the Writ Should be Denied	4
I. The Issues Sought To Be Raised By Petitioner Are Not Of Sufficent Breadth Or Importance to Warrant Review By This Court	4
II. In Any Event, The Court Of Appeals Gave Full Consideration To The Issues Before It And Decided Them Correctly	6
III. The Issues Presented By The Petitioner Were Not Properly Raised or Preserved Below	11
Conclusion	12

TABLE OF AUTHORITIES

Cases	Page
AES Technology Systems, Inc. v. *Coherent Radiation*, 583 F.2d 933 (7th Cir. 1978)	6
Dick v. *New York Life Ins. Co.*, 359 U.S. 437 (1959)	5
Drier v. *Perfection, Inc.*, ____S.D.____, 259 N.W.2d 496 (1977)	6, 7, 11
Graver Tank & Mfg. Co. v. *Linde Air Products Co.*, 336 U.S. 271 (1949)	5
S-C Industries v. *American Hydroponics System, Inc.*, 468 F.2d 852 (5th Cir. 1972)	8
Swenson v. Chevron Chemical Co., ____*S.D.*____, 234 N.W.2d 38 (1975)	7
United States v. *Johnson*, 268 U.S. 220 (1925)	5

Statutes

28 U.S.C. §1332 2
Comment 3, UCC §2-313 6
SDCL 57-3-4 11
SDCL 57-4-26 ..... 6, 9

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DRESSER INDUSTRIES, INC.,
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v.

COMMUNITY TELEVISION SERVICES, INC.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Community Television Services, Inc. ("Community"), respectfully requests that the Petition for Writ of Certiorari seeking review of the opinion and judgment of the Court of Appeals for the Eighth Circuit be denied.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 586 F.2d 637 (8th Cir. 1978) and is set out in Petitioner's Appendix A. The order of the Court of Appeals denying rehearing en banc is set out in Petitioner's Appendix B. The opinion of the District Court is reported at 435 F.Supp. 214 (D.S.D. 1977) and is set out in Petitioner's Appendix C.

JURISDICTION

Respondent accepts the jurisdictional statement of Petitioner.

QUESTIONS PRESENTED

1) Whether the District Court and Court of Appeals erred in finding that the jury verdict in this diversity case was supported by substantial evidence and in finding under state law that the terms of a printed disclaimer should not preclude or limit recovery by the Respondent for the Petitioner's breach of express warranty.
2) Whether the issues presented by the Petitioner were properly raised and preserved below.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

No constitutional provisions or federal statutes or federal regulations are involved in this matter. South Dakota law controls. *See* Petitioner's Appendix D.

STATEMENT OF THE CASE

This action arises out of the collapse of a television tower during a winter storm. The owner, Community, sued Dresser Industries, Inc. ("Dresser"), which designed, fabricated and erected the tower. Diversity jurisdiction was present under 28 U.S.C. §1332.

The case was tried to a jury. The evidence showed that in purchasing the tower, Community relied upon Dresser sales literature declaring:

> "Properly designed towers will safely withstand the maximum wind velocities and ice loads to which they are likely to be subjected. Dresser - Ideco can make wind and ice load recommendations to you for your area based on US Weather Bureau Data. Exhibit 1 at 15.
>
> Some of the Dresser - Ideco towers . . . have been in service since the very first days of television. In the winter, loaded with ice and hammered repeatedly with gale force winds, these towers absorb some of the toughest punishment that towers take anywhere in the country . . . yet continue to give dependable uninterrupted service." Exhibit 1 at 2.

In addition, technical specifications in the sales order required a "Design Wind Load" for the tower at 60 pounds per square foot ("psf") on flat surfaces, which translates to an actual wind velocity of 120 miles per hour (Exhibits 1, 2, 26).

Expert witnesses for both parties agreed that at the time of the collapse, the wind velocity was far below the design capacity of the tower. Community's experts testified that although each individual component of the tower conformed in a mathematical sense to the 60 pounds psf specification, the performance capacity of the structure as a whole was deficient. They concluded that the high winds caused "mechanical resonance" which resulted in the tower collapse (R 642-657, 1012-1016, 1154-1156).[1]

The jury found Dresser liable for breach of express warranty (R 1932-1933) and assessed damages in the amount of $1,385,001.61. The District Court denied Dresser's post-trial motions subject to a remittitur to $1,274,631.60.[2] Community consented to this remittitur.

Dresser claimed on appeal: (1) insufficiency of the evidence; and (2) a printed disclaimer on the reverse side of the Dresser sales order precluded liability. The Eighth Circuit affirmed:

> "We conclude that there is sufficient evidence to support the finding that Dresser breached its warranty that the tower, when free from defects in materials and workmanship and properly designed for its location, would withstand the wind and ice loads to which it would normally be subjected. The terms and conditions of sale in the written contract

---

[1] References will be made to Petitioner's Appendix [A] if possible and to the record [R] in all other instances.

[2] The trial court concluded that the verdict was excessive to the extent that the jury erred in computing the amount of depreciation for the destroyed tower, antenna and buildings.

> do not apply to the warranty, and therefore cannot limit Dresser's liability for its breach." 586 F.2d 637, 643 [A 14].

On petition for rehearing en banc, Dresser advanced all of the claims it makes here, including the argument that the Eighth Circuit's opinion was not supported by the trial record and therefore deprived Dresser of its right to trial by jury. The full Court of Appeals rejected these contentions and denied the petition. Although Chief Judge Gibson dissented from the denial, he agreed that there was sufficient evidence to establish breach of warranty:

> "In my view, the evidence was sufficient to uphold the jury verdict of liability based on breach of the express warranty contained in the written contract. Since I believe the evidence supported a finding of liability on at least one theory, it would be counterproductive to rehear the question of liability." 586 F.2d at 644 (Gibson, J., dissenting) [A 17].

Judge Gibson's only basis for disagreement with the majority was that, under South Dakota law, the limitation of liability provision in the printed disclaimer was applicable.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Issues Sought To Be Raised By Petitioner Are Not Of Sufficient Breadth Or Importance To Warrant Review By This Court.

None of the usual factors that might impel this Court to review the decision below are present. No questions of constitutional or federal statutory law are presented; nor is there any conflict among the courts of appeal; nor are the issues involved likely to be recurring. Rather this is a diversity action that turns entirely upon the unique facts of this case and upon the interpretation of the particular contract involved. Only questions of state law are at issue, and no one, other

than the litigants themselves, will be affected by the outcome.

Further review by this Court would only involve the examination of proper evidentiary rulings, and of findings derived from a complex factual setting, supported by substantial evidence. In essence, Petitioner seeks a fourth review of a lengthy trial record already reviewed once by the District Court and twice by the Eighth Circuit. As this Court has oft repeated, "We do not grant certiorari to review evidence and discuss specific facts." *United States* v. *Johnson*, 268 U.S. 220, 227 (1925); *see also, Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

In an effort to create a constitutional question where none exists, Petitioner urges that the decision below violates its Seventh Amendment right to trial by jury. A similar argument was rejected by Mr. Justice Frankfurter in his dissent in *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437 (1959):

> "If this case raises a question under the Seventh Amendment, so does every granted motion for dismissal of a complaint calling for trial by jury, every direction of verdict, every judgment notwithstanding the verdict. Fabulous inflation cannot turn these conventional motions turning on appreciation of evidence into constitutional issues, nor can the many diversity cases sought to be brought here on contested questions of evidentiary weight be similarly transformed by insisting before this Court that the Constitution has been violated. This verbal smoke screen cannot obscure the truth that all that is involved is an appraisal of the fair inferences to be drawn from the evidence." 359 U.S. at 455-456.

II. In Any Event, The Court of Appeals Gave Full Consideration To The Issue Before It and Decided Them Correctly.

A. *Breach of Express Warranty.* The Eighth Circuit properly held that the technical design wind load specification contained in the sales order was supplemented by the Dresser sales literature "to promise more than mere compliance with technical measurements." 586 F.2d at 640 [A 6].

> "We find that the statements in the advertising catalog, which supplement the wind loading specification, can reasonably have been found by the jury to be an affirmation of fact or a promise concerning the actual durability or performance of the tower during the wind and ice storms to which it was likely to be subjected." *Id.* at 640 [A 7].

The Dresser catalog was given to Community to induce its purchase of a Dresser product (R 12-16, 1431-1434). Under South Dakota law, in the absence of clear affirmative proof to the contrary, the affirmation in the catalog must be considered part of the "basis of the bargain." *Id.; see also Drier* v. *Perfection, Inc.*,_____S.D.___, 259 N.W.2d 496, 502 (1977); SDCL 57-4-26; Comment 3, UCC § 2-313. "The law is clear that express warranties may be made in advertisements, pamphlets or brochures." *Drier* v. *Perfection, Inc., supra,* 259 N.W.2d at 503. *See also AES Technology Systems, Inc.* v. *Coherent Radiation,* 583 F.2d 933, 939 (7th Cir. 1978).[3]

[3]The fact that the catalog was given to Community to induce the purchase of the first tower is of no effect. The later tower was a duplicate and both parties looked extensively to the first transaction for the terms of their agreement (R 13-31, 119-173, 191-192, 373-375, 1118-1120, 1406-1419, 1432-1439, 1741-1742, 1744-1745, 1774-1777). As explained to the District Court by *Petitioner's counsel:* "[Y]ou see the '68 tower was virtually the same tower as the '66 tower and when they decided on the specifications for the '68 tower, you have to go back to the '66 tower to see what they negotiated for." (R 30).

Breach of Dresser's express warranty was proven when the tower failed to live up to its promised performance capacity.[4] *Drier* v. *Perfection, Inc., supra,* 259 N.W.2d at 504; *Swenson* v. *Chevron Chemical Co.*,____S.D.____, 234 N.W.2d 38 (1975). As noted by the Court of Appeals: "In view of the affirmation made in the catalog, there was sufficient evidence for the jury to reasonably find that the tower was not as durable as it was warranted to be." 586 F.2d at 641 [A 8].

B. *The Disclaimer Provision Was Not Applicable To The Express Warranties In The Dresser Catalog.* The disclaimer and limited remedy provisions (item 9) contained in the Dresser sales order do not mention the catalog warranty which Dresser had given Community. The item 9 provision refers *only* to the "applicable specifications" in the sales order itself — i.e., the specification that the components of the tower would sustain 60 psf on flat surfaces. Under these circumstances, the only reasonable interpretation that could be placed on the disclaimer and limitation of remedy provision, in light of the prior express warranties contained in the Dresser catalog, was that item 9 applied only to the component parts of the tower which failed to meet "applicable specifications." Thus, while item 9 may have provided an exclusive remedy should any component part fail to meet applicable specifications, it did not supersede the specific ex-

[4] Petitioner surmises that "the Court of Appeals adopt[ed] Petitioner's evidence that ice loading had caused the tower to collapse . . ." Petition at 11. Petitioner has misconceived the opinion in this regard. The Court of Appeals stated:

> "[T]he evidence does not support the conclusion that the wind alone, or the combination of wind and ice which Dresser claimed caused the collapse, was not within the range of storm conditions to be reasonably contemplated for the tower's location." 586 F.2d at 641.

Thus, the Court of Appeals found that *either* under the Respondent's theory or under the Petitioner's theory there was sufficient evidence to support the breach of warranty claim.

press warranties in the Dresser catalog which extended to the durability and performance capacity of the tower as a whole. The Court of Appeals for the Fifth Circuit has reached the same result in a similar situation. *S-C Industries* v. *American Hydroponics System, Inc.*, 468 F.2d 852, 855 (5th Cir. 1972).

C. *The Issues Upon Which The Eighth Circuit Based Its Decision Were Fully Argued In The Trial Court And On Appeal.* Petitioner's contention that it was deprived of its "day in court both at trial and in the appeal" (Petition at 13) is totally without foundation in the record. The inescapable fact is that the sales representations contained in the Dresser catalog and upon which the Eighth Circuit based its decision were an integral part of Community's case throughout the trial and appellate proceedings.

From the outset, Community's complaint made it clear that more was alleged than a mere breach of the 60 psf technical specification. Count III of the complaint specifically alleged that Dresser warranted to Community through "sales material and literature" that the tower was properly and safely constructed and that the tower was of sufficient strength to be suitable for its intended uses (Filing No. 1). The complaint further alleged that Community relied upon Dresser's warranties and that such warranties proved false (*Id.*).

The Dresser catalog was the first subject of inquiry at trial. A Community official testified that the catalog was given to him by a Dresser representative (R 12-15). The catalog was discussed during the negotiation process and Community relied upon it in deciding to purchase the Dresser tower (R 15-16). The catalog was the plaintiff's first exhibit. Petitioner's suggestion that it was received for a "limited purpose" is

simply incorrect.[5] The catalog was the first subject presented to the jury by Community's counsel during closing arguments (R 1811-1812). Dresser's counsel did not mention the catalog and failed to respond to Community's argument in this regard. The catalog representations were again brought to the attention of the jury in Community's rebuttal argument (R 1872-1874).

The District Court instructed the jury that the "[t]echnical specification constituted an express warranty that the structure would withstand wind exerting a pressure of 60 pounds per square foot on the flat surfaces of the tower." (R 1896). Significantly, the District Court also instructed the jury, *without objection*, as follows:

> "Now, *any affirmation of fact or promise made* by the seller to the buyer which reflects to the goods or product and becomes part of the basis of the bargain creates an express warranty that the goods or product shall conform to the affirmation or promise. *Such affirmation or promise may be oral or in writing.*
>
> Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description." (R 1985). (Emphasis added).

The District Court further referred to "any affirmation of fact or promise" in reading SDCL 57-4-26 to the jury and in setting out the essential elements of proof under the theory of breach of express warranty (R 1895-1897). If the 60 psf

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[5] The trial transcript states:

Mr. Evans: Yes, I'm offering Exhibit 1.
The Court: Yes. Is there objection?
Mr. Doyle: Yes, we'll object on the basis that it's not material to any of the issues in the case.
The Court: The objection is overruled. Exhibit 1 will be received in evidence. (R 17-18).

The trial court commented later that Exhibits 1 and 2 might be superseded by a contract. The trial court, however, did not make such a ruling and Dresser never requested one (R 19-20).

specification were the only warranty at issue, there would have been no need to refer to an express warranty in these terms. More importantly, the District Court specifically refused Petitioner's requested instruction that the only warranty at issue in the case was the 60 psf specification.[6]

Petitioner's post-trial motions argued that the District Court improperly received "Plaintiff's Exhibit 1 into evidence." (Filing No. 36). The motions were denied, and Petitioner did not raise this issue on appeal.

Petitioner's assertion that the catalog warranty was never urged on appeal is also contrary to the record. Respondent's brief set out *verbatim* the catalog warranty and further stated that "[t]hese representations were discussed during the negotiation process and were relied upon by Community." [A 230]. Respondent's brief further stated:

> "The brochure was an integral part of the sales transaction; it explained the meaning of the 60 psf specification in detail. Under these circumstances, *the statements in the brochure also created express warranties.* 'The law is clear that express warranties may be made in advertisements, pamphlets or brochures.' " *Drier* v. *Perfection, Inc., supra,* ____ S.D.____, 259 N.W.2d at 502.
>
> On this appeal, Dresser now concedes the specification question created an express warranty as a matter of law. Appellant's Brief at 20. Presumably, Dresser's position is the same with reference to the statements in its brochure." [A 245] (Emphasis added).

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6 Petitioner's requested instruction number 8 read in pertinent part:

> "The only express warranty that Plaintiff has raised as a basis for recovery in this case is that contained in the statement: 'The tower shall be designed to resist a uniform wind load per drawing T-5172, sheet s-1, 60 psf on flats.' "

Dresser did not file any of its requested jury instructions to make them a part of the record, but this requested instruction is set out in Dresser's motion to vacate judgment (Filing No. 36).

Indeed, although the catalog warranty argument was expressly relied upon by Respondent both at trial and on appeal, the Petitioner failed until now to respond in any manner. Petitioner's contention that the catalog warranty was somehow invented by the Court of Appeals runs directly contrary to the opinion itself: *"[W]e agree with Community* that the warranty was amplified, in advertising materials Dresser gave to Community . . ." 586 F.2d at 640 [A 6] (Emphasis added).

III. The Issues Presented By The Petitioner Were Not Properly Raised or Preserved Below.

The Petitioner contends that the opinion of the Court of Appeals overlooked the parol evidence rule in connection with the catalog warranty. This assertion comes too late.

Under South Dakota law, the trial court *must find* that a written agreement was intended by the parties as a final expression of their agreement before the parol evidence rule will be applied to exclude extrinsic warranties. SDCL 57-3-4. In *Drier* v. *Perfection, Inc.,* ____ S.D.____, 259 N.W.2d 496 (1977), the Supreme Court of South Dakota held that an integration clause almost identical to the one in the Dresser sales order could not serve to exclude oral warranties where no finding was made that the written contract was intended as a final expression of the parties' agreement. Like the trial court in *Drier,* the District Court in the instant case did not make a "finding of finality." Moreover, *Petitioner never requested such a finding.*

Petitioner did not assert the parol evidence rule in its objection to the introduction of the catalog at trial (R 17-18); nor did Petitioner mention the rule in its motions for directed verdict (R 1198-1208, 1788-1790). As noted above, Petitioner did not except to the jury instructions on the issue of express warranty and did not propose any "limiting instructions" to the effect that the catalog warranties should not be considered by the jury. The burden was on the Petitioner to raise

this issue before the trial and appellate courts and Petitioner failed to do so.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

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